DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 10-209

Title: Blaine Lafler, Petitioner
v.
Anthony Cooper

Docketed: August 13, 2010

Lower Ct: United States Court of Appeals for the Sixth Circuit

Case Nos: (09-1487)

Decision Date: May 11, 2010

Questions Presented:

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 9 2010	Petition for a writ of certiorari filed. (Response due September 13, 2010)
Sep 1 2010	Order extending time to file response to petition to and including October 13, 2010.
Sep 13 2010	Brief amici curiae of Connecticut, et al. filed.
Oct 5 2010	Order further extending time to file response to petition to and including November 12, 2010.
Nov 12 2010	Brief of respondent Anthony Cooper in opposition filed.
Nov 12 2010	Motion for leave to proceed in forma pauperis filed by respondent.
Nov 23 2010	DISTRIBUTED for Conference of December 10, 2010.
Nov 23 2010	Reply of petitioner Blaine Lafler filed. (Distributed)
Dec 6 2010	DISTRIBUTED for Conference of December 10, 2010.
Jan 3 2011	DISTRIBUTED for Conference of January 7, 2011.
Jan 7 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 7 2011	Petition GRANTED. In addition to the Question presented by the petition for writ of certiorari the parties are directed to brief and argue the following Question: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"
Jan 20 2011	Brief amicus curiae of Wayne County, Michigan filed.
Feb 10 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including April 8, 2011.
Feb 10 2011	The time to file respondent's brief on the merits is extended to and including June 22, 2011.
Feb 14 2011	Motion to appoint counsel filed by respondent Anthony Cooper.
Mar 2 2011	Motion DISTRIBUTED for Conference of March 18, 2011.
Mar 21 2011	Motion to appoint counsel filed by respondent GRANTED. Valerie R. Newman, Esq., of Detroit, Michigan, is appointed to serve as counsel for the respondent in this case.

Apr 5 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including April 15, 2011.
Apr 15 2011	Brief of petitioner Blaine Lafler filed.
Apr 15 2011	Motion to dispense with printing the joint appendix filed by petitioner Blaine Lafler.
Apr 21 2011	Brief amici curiae of Connecticut and 26 Other States filed.
Apr 21 2011	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed.
Apr 22 2011	Brief amicus curiae of the United States filed.
Apr 28 2011	The time to file respondent's brief on the merits is further extended to and including July 15, 2011.
May 2 2011	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 6 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 15 2011	The time to file respondent's brief on the merits is further extended to and including July 18, 2011.
Jul 18 2011	Brief of respondent Anthony Cooper filed.
Jul 22 2011	Brief amicus curiae of Center on the Administration of Criminal Law, New York University School of Law filed.
Jul 22 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jul 22 2011	Brief amicus curiae of The Constitution Project filed.
Jul 22 2011	Brief amicus curiae of American Bar Association filed. VIDED
Aug 8 2011	SET FOR ARGUMENT ON Monday, October 31, 2011.
Aug 10 2011	CIRCULATED
Aug 10 2011	Record from U.S.C.A. for 6th Circuit is electronic.
Aug 11 2011	Record from U.S.D.C. for Eastern District of Michigan is electronic.
Aug 15 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 17 2011	Reply of petitioner Blaine Lafler filed. (Distributed)
Oct 31 2011	Argued. For petitioner: John J. Bursch, Solicitor General, Lansing, Mich., and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Valerie R. Newman, Assistant Defender, Detroit, Mich. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

10-209 AUG 9- 2010

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

BLAINE LAFLER

Petitioner,

v.

ANTHONY COOPER

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Anthony Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial.

On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan re-offering the plea agreement. The question presented is:

> Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Blaine Lafler, Warden of a Michigan correctional facility. The Respondent is Anthony Cooper, an inmate.

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OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished. Pet. App. 1a-22a. The order of the United States District Court granting the petition is also unpublished. Pet. App. 24a-42a. The decision of the Michigan Court of Appeals affirming Cooper's conviction is unpublished. Pet. App. 44a-47a.

JURISDICTION

The opinion of the Sixth Circuit filed May 11, 2010, affirmed the decision of the Eastern District of Michigan granting Cooper habeas relief. Pet. App. 1a – 22a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

INTRODUCTION

After a fair and reliable trial, Respondent Cooper was convicted of assault with intent to commit murder in a Michigan court, but the United States Court of Appeals for the Sixth Circuit determined that he was entitled to a writ of habeas corpus because his trial counsel deficiently advised him to reject a plea bargain before trial. This decision violates the statutory restrictions on federal habeas corpus review of State court convictions and is wrong as a matter of Sixth Amendment interpretation. It created a species of prejudice cognizable under the Sixth Amendment that ignores the Amendment's purpose: to ensure a fair trial for the criminally accused. The kind of prejudice suffered by Cooper cannot form the basis for relief under the Sixth Amendment because his conviction was obtained after an admittedly fair and reliable trial.

28 U.S.C. § 2254(d) required the Sixth Circuit to limit its review to whether the State court adjudication contravened "clearly established" Supreme Court law. This Court has not clearly established that a criminal defendant in Cooper's situation is prejudiced in a way that is cognizable under the Sixth Amendment. Neither *Strickland v. Washington* nor *Hill v. Lockhart*, the two cases relevant to the issue, supports such a new rule. [1] The prejudice requirements of both those cases limit relief to circumstances where counsel's deficient performance affected the fairness or existence of a trial. *Strickland* requires that a defendant show that his counsel's conduct affected the fairness or reliability of a trial that was held, and *Hill* requires

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985).

that a defendant show that his counsel's conduct resulted in his client's decision to forgo a trial altogether. No case from this Court addresses the situation where deficient performance resulted in a fair and reliable trial rather than a plea. Accordingly, the Sixth Circuit was required to reject Cooper's claim under §2254(d) because it could not be supported by this Court's clearly established precedent.

Moreover, as a matter of constitutional law, even if counsel deficiently advises his client to reject a plea deal, there is no violation of the Sixth Amendment if the defendant thereafter receives a fair trial. When prosecutorial misconduct prevents a plea bargain, this Court has found that a receipt of a fair trial bars relief. The same rationale should prevent relief here. In *Strickland*, this Court identified the purpose of the Counsel Clause as ensuring that a defendant receives a fair trial. The purpose of the Clause is fulfilled despite bad advice by counsel to reject a plea offer when the conviction nevertheless results from a fair trial. It is true that a criminal defendant in this situation may receive a harsher sentence than he would have but for his counsel's deficient performance, but because that injury does not stem from any unfairness in the trial that resulted in the harsher sentence, it is not actionable under the Sixth Amendment.

The Constitution guarantees a criminal defendant a fair trial or fair plea, and Respondent had a fair trial. And while the Constitution also guarantees effective counsel, it does not require a court to overturn a conviction based on a fair trial because effective counsel would have procured a more favorable plea.

STATEMENT OF THE CASE

A. The Facts of the Crime

Cooper's imprisonment arises from the March 25, 2003, shooting of Kali Mundy outside of an apartment building in Detroit. As Ms. Mundy walked towards her car, she saw Cooper pull up in a vehicle. Mundy and Cooper began walking towards each other. When they were about six-feet apart, Cooper pulled out a handgun, pointed it at Mundy's head, fired, but missed. Mundy ran but Cooper fired additional shots and hit her in the thigh and buttocks. She collapsed at the door of a nearby house. One bullet perforated her intestines and the resulting injury was life-threatening. Mundy survived after a two and one-half week hospital stay.

Detroit Police Officer Randell Coleman happened to be nearby and witnessed the shooting. He radioed a description of the shooter, and he saw two other officers almost immediately apprehend Cooper.

B. State Court Proceedings

At a pretrial conference the prosecutor acknowledged a sentence offer of 51-to-85 months (on the minimum sentence) in exchange for pleading guilty to assault with intent to murder. Pet. App. 48a – 49a.[2] At the end of the pretrial conference, trial counsel stated that he had talked with Cooper about the offer and that the offer would not be accepted. Pet. App. 51a. Trial counsel had mistakenly advised Cooper that

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[2] Michigan has an indeterminate sentencing scheme in which a criminal defendant receives a minimum sentence and a maximum sentence. *People v. Lowe*, 484 Mich. 718, 724; 773 N.W.2d 1, 3-4 (2009).

the location of the wounds precluded a finding that he intended to murder the victim.[3] Following trial, the accuracy and fairness of which was not challenged by Cooper in his federal habeas proceeding, the jury found Cooper guilty as charged. Cooper was subsequently sentenced to a minimum prison term of 185 months for the assault conviction and lesser terms for related firearm convictions. The maximum sentence was 30 years.

Cooper filed a direct appeal with the Michigan Court of Appeals and raised, among others, the following claim:

> Defense counsel rendered ineffective assistance, under the State and federal constitutions, where he failed to convey the sentencing benefits of the plea offer to [Cooper] and ignored his desire to plea guilty.

Cooper received an evidentiary hearing on his ineffective assistance of counsel claim. Following the hearing, the trial court determined that there was no ineffective assistance of counsel based on the record. Pet. App. 52a-55a.

On March 15, 2005, the Michigan Court of Appeals issued an unpublished *per curiam* opinion affirming Cooper's convictions. Pet. App. 44a-47a. The court summarily rejected the claim on the merits, finding that "[t]he record fails to support [Cooper's]

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[3] Petitioner does not challenge the finding by the District Court and Sixth Circuit that counsel's advice was based on a mistaken belief regarding State law. Pet. App. 12a-16a.

contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant." Pet. App. 45a. On October 31, 2005, the Michigan Supreme Court denied Cooper's application for leave to appeal. Pet. App. 43a.

C. Federal Court Proceedings

Cooper, through counsel, filed a petition for writ of habeas corpus, raising the following claim:

> Trial counsel rendered incompetent advice during the plea bargaining process which denied [Cooper] the effective assistance of counsel.

The District Court conditionally granted habeas relief, requiring the State to release Cooper if it did not re-offer him the 51-to-85 month sentence agreement on the minimum. Pet. App. 42a.

The Sixth Circuit affirmed. Modifying the prejudice component of *Hill* to fit the facts of the case, the court found that to sustain a claim of ineffective assistance of counsel, Cooper was required to show a "reasonable probability that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer." Pet. App. 12a. The Sixth Circuit reasoned "to say that there is no prejudice because [Cooper] ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants. . . . [Cooper] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 18a-19a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit contravened 28 U.S.C. §2254(d)(1) where this Court has not clearly established entitlement to relief for ineffective assistance of counsel during plea bargain negotiations when the defendant is later convicted and sentenced pursuant to a fair trial.

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress placed strict limits on when federal courts can grant habeas relief. In particular, 28 U.S.C. § 2254(d)(1) forbids federal courts from granting habeas relief based on a state court merits decision unless that decision conflicts with "clearly established Federal law, as determined by the Supreme Court of the United States." The Michigan Court of Appeals summarily denied Petitioner's claim on the merits by finding that "[t]he record fails to support [Cooper's] contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant."

Pet. App. 45a. Though brief, this adjudication was on the merits and is entitled to § 2254(d)(1) deference.[4]

This Court has not clearly established that a defendant is prejudiced as that term has been defined by this Court's ineffective-assistance-of-counsel jurisprudence when the defendant rejects a plea offer because of deficient advice by his attorney but is then convicted after a fair and reliable trial. A defendant is not prejudiced in a cognizable way in that situation because he ultimately received precisely the process that the Counsel Clause of the Sixth Amendment guarantees – a fair trial. Although lower courts have held that a defendant can state a Sixth Amendment claim in this situation, several courts have reached the contrary conclusion. Until this Court resolves the question, a State court cannot be said to conflict with "clearly established Federal law, as determined by the Supreme Court of the United States" when it denies such a claim of ineffective assistance of counsel.

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[4] *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310-312 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000)(*en banc*); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). In *Harrington v. Richter*, 130 S. Ct. 1506 (2010), this Court granted certiorari and asked the parties to address the question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?" The Sixth Circuit assumed for purposes of argument that this was a merits determination. Pet. App. 36a. And even if this Court determines that AEDPA deference does not apply, the decision is wrong on the merits. *See* Argument II.

In *Arave v. Hoffman*, the Court granted certiorari, in part, to address this precise issue.[5] The Court specifically ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[6] The court dismissed the case, however, under Rule 46 on mootness grounds and never reached the merits.[7] Accordingly, the issue of whether a criminal defendant suffers cognizable prejudice in such a situation remains open. This Court did not clearly establish an answer in *Arave* and has not done so in any subsequent case.

A. This Court's ineffective-assistance-of-counsel-jurisprudence does not clearly establish entitlement to relief when counsel's deficient performance results in a fair and reliable trial.

Neither *Strickland* nor *Hill* supports a finding of cognizable prejudice when deficient performance results in nothing more than a fair and reliable trial. *Strickland* exists specifically to ensure that a criminal defendant receives a fair trial. While a criminal defendant in Cooper's position has obviously suffered a form of factual prejudice – but for the bad advice he likely would have accepted a plea bargain with a more favorable sentence – that sort of prejudice is not the type of injury this Court's ineffective-assistance-of-counsel jurisprudence was created to remedy.

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[5] *Arave v. Hoffman*, 552 U.S. 1008 (2007).

[6] *Arave*, 552 U.S. at 1008.

[7] *Arave v. Hoffman*, 552 U.S. 117 (2008).

Strickland noted that "the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial."[8] The Court explained that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[9] The *Strickland* test was developed to ensure a fair trial.[10] Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[11] Despite the loss of the favorable sentencing agreement, the State process in this case ultimately produced a just result: Cooper's trial was fair and reliable and his sentence was lawful and proportionate.

The *Strickland* prejudice inquiry was likewise designed to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[12] Therefore, "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system

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[8] *Strickland*, 466 U.S. at 684-685.

[9] *Strickland*, 466 U.S. at 685.

[10] The Sixth Amendment right to *counsel of choice*, also based on the Counsel Clause, is not grounded on fair trial concerns but is not implicated by this case. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).

[11] *Strickland*, 466 U.S. at 686.

[12] *Strickland*, 466 U.S. at 691-692.

counts on to produce just results."[13] The trial here was undeniably reliable as Cooper does not contest anything that occurred there.

To the extent there was a breakdown in the adversarial plea-bargaining process, it merely resulted in the loss of a settlement – it did not affect the fairness of the proceeding that produced the conviction. As this Court found in *Lockhart v. Fretwell*, the "prejudice" component of ineffective assistance "focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair. . . . Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[14] Cooper had no right to settle his case.[15] There is nothing about counsel's performance in Cooper's case that calls into question the justness, fairness, or reliability of his trial. As a consequence of counsel's bad advice, Petitioner went to trial and received a fair and reliable proceeding – which, this Court held in *Strickland*, is all that the Sixth Amendment's Counsel Clause seeks to protect.

Nor does *Hill* support the decision of the Sixth Circuit. In *Hill*, the habeas petitioner argued that his counsel's deficient advice caused him to *accept* a plea offer and forego his constitutional right to a fair trial. This is a critical factual distinction from the present

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[13] *Strickland*, 466 U.S. at 696.

[14] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[15] *Mabry v. Johnson*, 467 U.S. 504, 510-511 (1984), abrogated on other grounds by *Puckett v. United States*, 129 S. Ct. 1423 (2009).

case. This Court found that in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would *not* have pleaded guilty and would have insisted on going to trial.[16] This application of the *Strickland* standard is in keeping with its purpose; more than adversely affecting the fairness of the trial, the deficient performance in *Hill* resulted in the complete loss of a trial. The same is not true of the situation presented by this case. When counsel's deficient advice results in nothing less than a fair and reliable trial, the interests of the Counsel Clause have been fully served. Because Cooper was not cognizably prejudiced, there was no violation of the Sixth Amendment.[17]

In *Wright v. Van Patten*, this Court reiterated that the term "clearly established federal law" in 28 U.S.C. § 2254(d)(1) is a narrow one and that only decisions that "squarely address[]" the issue in a case fit the bill.[18] Because there was no such decision that could form the basis for the Sixth Circuit's decision in this case, the Court should grant the petition and reverse the Sixth Circuit.

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[16] *Hill*, 474 U.S. at 58-59.

[17] *Gonzalez-Lopez*, 548 U.S. at 147 (2006) ("The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there--effective (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense . . . . [A] violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.").

[18] *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).

B. The existence of divergent remedies applied by lower courts indicates a lack a clear direction emanating from this Court.

Moreover, lower courts have imposed divergent remedies in this situation. This provides further evidence that there is no clearly established law from this Court controlling the lower courts' choice of remedy. Some courts have granted the defendant a new trial.[19] Other courts have specifically enforced the forgone plea offer.[20] And still other courts have crafted remedies that are hybrids of the new-trial and reinstatement-of-plea approaches or that are entirely

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[19] *See, e.g., United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998); *State v. Taccetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *People v. Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State v. Lentowski*, 569 N.W.2d 758, 761-62 (Wis. 1997); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *Ex Parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

[20] *See, e.g., Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *Satterlee v. Wolfenberger*, 453 F.3d 362, 368-69 (6th Cir. 2006); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (requiring specific enforcement of the original plea unless the prosecution shows non-vindictive reasons for changing or withdrawing it); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea); *De Jesus Garcia Jiminez v. State*, 114 P.3d 903, 907 (Ok. Ct. Crim. App. 2006).

different.[21] Lastly, some courts believe no remedy is appropriate because there is no prejudice in the first place.[22]

In *Carey v. Musladin*, this Court stated, "Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the issue.[23] The lack of uniformity in the lower courts'

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[21] *See, e.g., Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (ordering defendant's sentence to be reduced to the time he had already served and him discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial); *In re Alvernez*, 830 P.2d 747, 760 (Cal. 1992) (permitting prosecutor to choose between resubmission of the original plea within thirty days or a new trial); *Tucker v. Holland*, 327 S.E.2d 388, 396 (W.Va. 1985) (refusing to reinstate the original plea but directing trial court to consider that plea for approval (or rejection)); *Harris v. State*, 437 N.E.2d 44, 45 (Ind. 1982) (permitting defendant to choose between reinstatement of the original plea or a new trial); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. App. 1978) (directing trial court to consider original plea for approval unless state withdraws plea, in which case defendant gets a new trial); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. 1978) (granting defendant the opportunity to engage in a new plea bargain with the advice of counsel, and if discussion breaks down, a new trial).

[22] *See, e.g., State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000); *see also United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) (No prejudice as matter of law for failing to advise defendant to take plea bargain where subsequent, less favorable, plea was voluntarily entered). This Court recognized that this is one of the possible remedial options through the phrasing of its question in *Arave*: "What, if any, remedy should be provided . . ." *Arave*, 552 U.S. at 1008 (emphasis added).

[23] *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

approaches to this issue is powerful evidence that this Court's ineffective-assistance-of-counsel jurisprudence does not clearly establish a right to specific performance of the plea-bargain as ordered by the Sixth Circuit. Because this Court has not clearly established the appropriate remedy, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed.

II. Irrespective of the limitations imposed by §2254(d)(1), the State court correctly denied relief.

In habeas corpus proceedings, this Court has the authority to clarify constitutional rules as long as these clarifications do not create new rules providing a basis for obtaining habeas relief. For example, in *Berghuis v. Thompkins*, the Court did not limit its holding to a determination of the reasonableness of the State court decision, but also found that it was correct.[24] So too here, not only did the State court issue a decision that did not contravene clearly established precedent of this court, the result was also correct.

There is no constitutional right to relief for a criminal defendant who has been convicted after a fair and reliable trial on account of his attorney's failure to secure a more favorable resolution of the case. To be sure, the plea bargaining process is critical to the functioning of our criminal justice system. But not every break-down in that system violates the Constitution. Even where a break-down in the plea

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[24] *Berghuis v. Thompkins*, 560 U.S. ____ ; 130 S. Ct. 2250, 2264 (2010).

bargaining process is attributable to a mistake of defense counsel, if the system nevertheless nets a fair and reliable trial, then the purpose of the Counsel Clause has been fulfilled.

As Judge Easterbook wrote in *United States v. Springs*, "[n]ot every adverse consequence of counsel's choices is 'prejudice' for constitutional purposes."[25] In that case, the Seventh Circuit found that a criminal defendant, as a matter of law, could not demonstrate *Strickland* prejudice for defense counsel's failure to secure a favorable plea deal, where the defendant subsequently voluntarily accepted a second, less-favorable deal and pled guilty. This is because, as this Court stated in *Fretwell*, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[26] "Prosecutors need not offer discounts and may withdraw their offers on whim. Defendants have no substantive or procedural right to bargain-basement sentences. As a matter of law, Springs did not suffer 'prejudice' from the representation he received."[27]

Limiting the Counsel Clause as in *Springs* would also be consistent with the reasoning of *Mabry v. Johnson* and *Weatherford v. Bursey*.[28]

In *Mabry*, the government offered a plea but when defense counsel called later and attempted to

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[25] *Springs*, 988 F.2d at 749.

[26] *Fretwell*, 506 U.S. at 372.

[27] *Springs*, 988 F.2d at 749.

[28] *Weatherford v. Bursey*, 429 U.S. 545 (1977).

accept the deal, the prosecutor changed his mind and withdrew it. The defendant subsequently accepted a harsher plea bargain. The defendant argued that due process principles entitled him to the benefit of the first offer, and the Sixth Circuit agreed, holding that "fairness" prevented the government from withdrawing the original plea offer after it had been accepted.[29] This Court reversed, explaining that only the plea that resulted in the sentence had constitutional significance:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.[30]

The Court held that even if the prosecutor was "negligent or otherwise culpable" in reneging on the original plea agreement, the Constitution's concern is only "with the manner in which persons are deprived of their liberty."[31] The same reasoning applies here. Cooper is in prison because of a fair and reliable trial,

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[29] *Mabry*, 467 U.S. at 506.

[30] *Mabry*, 467 U.S. at 507-08.

[31] *Mabry*, 467 U.S. at 511.

not because of a plea offer that was never executed. The prosecutor's conduct in *Mabry* did not affect the fairness of the proceeding that resulted in that defendant's imprisonment, and so too defense counsel's conduct here did not affect the fairness of the proceeding that resulted in Cooper's imprisonment.

Weatherford is similar. There, the defendant complained that an undercover government agent, pretending to be a co-defendant, affected the fairness of the plea bargaining process. The Supreme Court noted that the prosecution's misconduct may have denied the defendant the opportunity to engage in plea bargaining, but it found that there was no cognizable prejudice because the defendant "was not denied a fair trial."[32] An unfairly lost opportunity to resolve the case on more favorable terms did not provide grounds for relief because the conviction was ultimately obtained after a fair trial. There is no principled reason the result of the present case should be different.

Cooper had a fair trial. His counsel performed competently at trial and it produced a just and reliable result. Cooper does not dispute that. It is strange then, that the Counsel Clause could be interpreted to require the State to vacate the conviction that resulted from that trial and require it to offer Cooper a plea bargain to which he never had entitlement. The Court should reverse the judgment and of the Sixth Circuit and clarify that the Counsel Clause does not support such a result.

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[32] *Weatherford*, 429 U.S. at 560.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY COOPER, Petitioner-Appellee,
v.
BLAINE LAFLER, Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: KENNEDY, COLE, Circuit Judges, and JORDAN*, District Judge.

CORNELIA G. KENNEDY, Circuit Judge. The state appeals the district court's grant of habeas relief to a petitioner who rejected a guilty plea based on the advice of counsel. The district court held that petitioner's counsel provided objectively unreasonable advice, and that petitioner relied on that advice in rejecting the plea, going to trial, and receiving a much higher sentence. Because we agree the state courts' decision rejecting petitioner's argument was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and because the terms of the district court's conditional writ are reasonable, we AFFIRM.

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* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2003, around 7:30 in the evening, Kali Mundy left an apartment building where she was visiting an acquaintance. As she entered her car, she saw the petitioner pull up in a Ford Explorer being driven by Tava Simon. Mundy had met petitioner once or twice prior, and exited her car as he exited his. They began walking towards each other. When they were six feet away from one another, Mundy testified, petitioner pulled out a handgun, pointed it towards Mundy's head, and fired.

An uninjured Mundy ran, but the shots continued. She was about forty yards away when a bullet hit her in the buttocks and another her thigh. She heard at least four shots being fired throughout the ordeal. She continued running, eventually collapsing at a neighbor's door.

An ambulance transported Mundy to a nearby hospital, where doctors discovered she had four bullet holes – two entrance wounds and two exit wounds. During an exploratory surgery, Dr. Ian Rubenstein discovered that one of the bullets had pierced her intestines, which were leaking. In Rubenstein's opinion, this was a life-threatening injury. Through surgery, he was able to repair Mundy's intestines, and Mundy was discharged after spending two-and-one-half weeks in the hospital and an additional period in rehabilitation. Mundy continues to experience daily pain from the incident.

Fortuitously, there were several police officers in the vicinity that evening. Officer Randell Coleman witnessed the shooting from several blocks away. He radioed a description of the shooter, who was running away from the scene of the shooting. Two other officers were in the vicinity, and Coleman witnessed them detain

petitioner almost immediately. A small amount of marijuana was discovered in petitioner's pocket. Petitioner was transported to the police station, where a gunshot residue test was performed on him. William Steiner, a forensic chemist with the police department, testified that the test was positive, which indicated that petitioner had been in the presence of a firearm that had been discharged recently.

Petitioner was charged in the district court in Wayne County, Michigan, with Assault with Intent to Murder, Possession of a Firearm by a Felon, Possession of a Firearm in the Commission of a Felony, misdemeanor Possession of Marijuana, and a habitual offender enhancement. On April 14, 2003, Mundy, Coleman, and the arresting officer testified at petitioner's preliminary examination. At the examination, petitioner was represented by Brian McClain, who represented petitioner through sentencing. Following their testimony, the district court bound petitioner over to stand trial on all charges.[1]

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[1] Rather than using a grand jury system, Michigan utilizes a preliminary examination where a district court "determine[s] whether probable cause exists to believe that a crime was committed and that the defendant committed it." *People v. Lowery*, 274 Mich. App. 684, 684, 736 N.W.2d 586, 589 (2007) (citing *People v. Perkins*, 468 Mich. 448, 452, 662 N.W.2d 727, 730 (2003)); *see also* Mich. Comp. Laws § 766.13. If the district court finds that there is sufficient evidence, the defendant is bound over to the circuit court to stand trial. Although the state need not prove its case beyond a reasonable doubt to have a defendant bound over, the district court must focus "his or her attention to whether there is evidence regarding each of the elements of the offense, after examining the whole matter." *People v. Greene*, 255 Mich. App. 426, 444, 661 N.W.2d 616, 627 (2003) (quotations omitted). For a felony

After the preliminary examination hearing, the prosecutor communicated a verbal plea offer to McClain. The deal would have allowed petitioner to plead guilty to assault with intent to murder and face a below-guidelines minimum sentence of 51 to 85 months imprisonment. Petitioner indicated a willingness to accept a plea offer because he "was guilty,"[2] but the conversation he had with his attorney changed his mind. McClain had recently received Mundy's medical records, and believed that the nature of her injuries counseled against accepting a plea. At a post-conviction hearing, McClain recalled that during this conversation he advised petitioner not to plead guilty because the assault with intent to commit murder charge "could not be supported by the evidence." Petitioner had a similar recollection. As he remembered it, because the victim was shot below the waist, McClain "told me that wasn't attempted murder," and that "they couldn't find me guilty of the charge [of assault with intent to commit murder] because the woman was shot below the waist." Petitioner specifically denied that McClain had ever told him: "I think you can be convicted of assault with intent to murder even if I think this is really nothing more than a great bodily harm [sic], certainly a jury still might find you guilty of assault with intent to murder." McClain was confident that the prosecution would ultimately offer a plea deal of 18 to 84 months closer to trial. McClain later admitted, however, that he could not remember a time

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charge, a defendant may appeal the bindover decision to the circuit court, the Michigan Court of Appeals, and the Michigan Supreme Court. *See id.* at 434, 661 N.W.2d at 621. Petitioner's counsel did not appeal the district court's decision to bind petitioner over for trial.

[2] McClain also testified that petitioner had indicated a desire to plead guilty.

when the prosecution's plea offer improved by the time of trial, absent a change in the evidence.

Thus, at a pre-trial conference on July 17, 2003, a week before trial was to begin, the prosecution provided petitioner and his counsel a written plea agreement of 51 to 85 months. McClain indicated on the record that the prosecutor's offered deal was "not reasonable," that there "is insufficient evidence" and that the "Prosecution does not have the evidence to try to [sic] this case."[3] The prosecutor, offended by McClain's comment that the offer was unreasonable, then stated "I withdraw this offer." (*Id.* at 4.) Undeterred, McClain then said, "We're just rejecting the offer." (*Id.* at 5.) Petitioner, who was present at the conference, was reading the plea offer he had just received. He was not asked about the plea agreement, and did not offer any comment on it.

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[3] On the record, McClain emphasized at length his view of the prosecution's evidence:

> After reviewing the medical report, your Honor, I believe that the Prosecution does not have the evidence to try to [sic] this case. We're willing to go to trial, but in the interest of Justice and due to the fact that [prosecutor] Mr. Skywalker is not trying the case, I would like to discuss this matter with the attorney who has will [sic] make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.
>
> I am fully prepared to prove that they do not have sufficient evidence at trial. I think the medical evidence will show that at trial.

Before trial, petitioner sent a letter to the presiding judge, expressing his desire to plead guilty to felonious assault, which carried a lower guidelines sentence than that offered to him by the prosecution. In the letter, he asserted that Mundy had a gun, and that he had shot her because he believed that she was going to harm another person. The trial judge, lacking authority to compel the prosecution to offer a plea deal, took no action. McClain was not aware of the letter until later.

On the first day of trial, the prosecution offered a significantly less favorable plea deal. The state would have allowed petitioner to plead guilty to assault with intent to commit murder, and agree to dismiss the other charges, including the habitual offender enhancement. This offer included a minimum sentence range of 126 to 210 months imprisonment. Petitioner rejected this plea agreement.

The case proceeded to trial. At trial, the prosecution's evidence was substantially similar to the evidence presented at the preliminary examination hearing. The most significant difference was the introduction at trial of Mundy's medical records and the testimony of a treating physician at the emergency room. The defense did not dispute petitioner's involvement in the shooting. Petitioner did not testify. Instead, the defense brought out testimony that there had been a previous, never identified conflict between Mundy and one of petitioner's companions. Based on this testimony, the defense cast Mundy as the person responsible for the confrontation by lying in wait, and then running towards the petitioner's vehicle when it arrived. The defense also advanced the theory that the location of Mundy's injuries suggested that there was no intent to kill.

The jury found petitioner guilty of all crimes as charged, and he was sentenced to 185 to 360 months

imprisonment. He did not file a direct appeal. However, in a post-conviction proceeding before the state trial court, petitioner raised several claims of ineffective assistance of counsel, and the state trial court held a hearing to assess his claim that counsel provided erroneous advice that led him to reject a favorable plea bargain. At the hearing, both McClain and petitioner testified about their conversation preceding the July 17 pre-trial conference. Following the hearing, the state trial court found that "[i]t was Mr. Cooper's belief based on his having counsel over in the jail, his being familiar with the hierarchy of charges, that at the absolute most . . . that he should only be found guilty of a felonious assault." Both petitioner and his attorney, the state trial court found, "were convinced that [conviction of assault with the intent to murder] couldn't occur." At another time, the state trial court described what happened as "[McClain] made an assessment based on his years as a criminal lawyer as to what he thought the People could or couldn't prove and what the medical evidence could or could not support and he made a recommendation to Mr. Cooper." However, the state trial judge ruled against petitioner's claim, finding that "Mr. Cooper made his own choices."

Petitioner appealed from the denial of the motion, and the Michigan Court of Appeals rejected his claim of ineffective assistance of counsel. *People v. Cooper*, No. 250583, 2005 WL 599740 (Mich. Ct. App. Mar. 15, 2005). The court reasoned:

> [T]he record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim

> of self-defense and because he did not obtain a more favorable plea bargain for defendant.

Id. at *1. The Michigan Supreme Court denied leave to appeal. *People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (Mich. Oct. 31, 2005) (table).

Petitioner then filed this petition in United States District Court seeking relief under 28 U.S.C. § 2254, alleging that his trial counsel provided ineffective assistance of counsel during the plea process. The district court conditionally granted the writ, holding that the state appellate courts unreasonably applied the Supreme Court's standards governing ineffective assistance claims, and that petitioner's trial counsel had provided ineffective assistance when he advised petitioner that the circumstances failed to satisfy the elements of assault with intent to commit murder and that he could negotiate a better plea deal later on. *Cooper v. Lafler*, 2009 WL 817712 (E.D. Mich. 2009). The district court concluded that "specific performance" of the plea deal that petitioner would have taken but for his attorney's ineffectiveness was warranted. It conditionally granted a writ, requiring the state to offer petitioner a sentence agreement of 51 to 85 months or release petitioner. The state timely appealed, arguing that counsel provided competent advice, there was no prejudice because petitioner received a fair trial, and the remedy ordered by the district court is unlawful.

STANDARD OF REVIEW

We review de novo the district court's decision to grant habeas relief. *Robinson v. Mills*, 592 F.3d 730, 734 (6th Cir. 2010).

The federal courts may grant habeas relief to a petitioner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we may not grant habeas relief on a claim adjudicated on the merits by the state courts unless the state court's adjudication of a petitioner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1). Each of the clauses in subsection (1) carries independent meaning. *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

"Contrary to" means "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* A state court decision can be "contrary to" federal law in two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme

> Court precedent and arrives at a result opposite to ours.

Id.

"A decision is an unreasonable application of clearly established federal law, on the other hand, if 'the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.'" *Smith v. Mitchell*, 567 F.3d 246, 255 (6th Cir. 2009) (quoting *Taylor*, 529 U.S. at 407).

Here, the Michigan Court of Appeals, "the last state court to issue a reasoned opinion on the issue," *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)), failed to appreciate the nature of petitioner's claim. Rather than addressing petitioner's argument that he received legally erroneous advice from his counsel, the court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel. *See Cooper*, 2005 WL 599740, at *1. To the extent that petitioner's claim was addressed, it is not clear from the court's abbreviated discussion (only two sentences of the opinion is even arguably responsive to petitioner's claim) what the court decided, or even whether the correct legal rule was identified. Equally unclear is whether we review such a claim de novo, *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (stating that deference was inappropriate when the state court applies a legal rule that contradicts governing Supreme Court law); *Van v. Jones*, 475 F.3d 292, 293 (6th Cir. 2007) (applying de novo review when state court did not address claim); *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (applying de novo review when state court applied a legal rule contradicting governing Supreme Court law), or under some form of deferential review,

Holder v. Palmer, 588 F.3d 328, 341 (6th Cir. 2009) (extending deference when state court's analysis was "flawed"); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (extending deference when state court denied claim without articulating reasoning); *see also Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc), *cert. granted, Harrington v. Richter*, --- S. Ct. ----, 2010 WL 596530 (2010). However, we need not decide how much deference the terse analysis provided by state court of appeals is entitled to here, because "[w]ith or without such deference, our conclusion is the same." *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010). Even full deference under AEDPA cannot salvage the state court's decision.

DISCUSSION

Petitioner's claim is that he was denied the effective assistance of counsel during pretrial proceedings when his counsel provided him erroneous advice. A petitioner must establish two elements to prevail on an ineffective assistance of counsel claim: deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel rendered deficient performance when he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. We consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. When assessing deficiency, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

If counsel provided ineffective assistance, we must then determine whether the petitioner was prejudiced. Petitioner need not show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. However, he must show that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The *Strickland* framework for evaluating counsel ineffectiveness applies to advice regarding whether to plead guilty. *Padilla v. Kentucky*, --- S. Ct. ----, 2010 WL 1222274 (2010); *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). The deficiency portion of the test remains unchanged. Instead of focusing on the fairness of the trial, the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59. If petitioner pleaded guilty, then petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* If petitioner chooses to reject a plea offer, on the other hand, he must show a "*reasonable probability* that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer." *Magana v. Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

1. Deficient Performance

First, petitioner's attorney provided deficient performance. Counsel advised petitioner that he could not be convicted of assault with intent to commit murder because the bullets entered the victim's body below the waist. "The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v. Brown*, 267 Mich. App. 141, 147, 703 N.W.2d 230,

236 (2005) (quotations and footnote omitted). Thus, "in order to find a defendant guilty of this crime, it is necessary to find that there was an actual intent to kill." *People v. Taylor*, 422 Mich. 554, 567, 375 N.W.2d 1, 7 (1985) (citations omitted). Petitioner's counsel advised him that because the victim was injured below the waist, the prosecution could not establish the element of intent.

Counsel was wrong. The nature of the victim's wounds are not a dispositive consideration in determining whether the accused possessed an intent to kill. *See People v. Brown*, 159 Mich. App. 428, 432, 407 N.W.2d 21, 23 (1987) (rejecting defendant's argument that no rational jury could have inferred his intent to kill because he only inflicted a "superficial wound" onto the victim's neck, and noting that "[a] corpse is not necessary to establish the requisite intent"); *People v. Cochran*, 155 Mich. App. 191, 194, 399 N.W.2d 44, 45 (1986) (holding that defendant could be found guilty of assault with intent to murder when he fired one shot into the air). Instead,

> the jury 'may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.' And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.

Taylor, 422 Mich. at 568, 375 N.W.2d at 8.

Here, the evidence introduced during the preliminary examination (at which petitioner was represented by McClain) indicated that petitioner used a gun, from short-range, and fired multiple shots at the victim as she was fleeing. The evidence introduced at trial was substantially similar to the testimony from the preliminary examination. The most significant change to the evidence introduced at the preliminary examination was the addition of Mundy's medical records. But the medical evidence supported, rather than refuted, an inference of intent to kill. A wound to the body just below the waist jeopardizes many life-sustaining organs, and Mundy's emergency room physician noted that her injuries were life threatening. As seen from the result in petitioner's trial, this evidence was in fact legally sufficient to convict a defendant of assault with intent to commit murder.

Thus it is clear that counsel informed petitioner of an incorrect legal rule. Further, counsel focused on that incorrect legal rule in advising petitioner not to accept the state's plea offer. Providing such erroneous advice in the face of settled Michigan law is obviously deficient performance. *See Padilla*, --- S. Ct ----, 2010 WL 1222274, at *9 (noting that *Strickland's* application to affirmative misadvice is settled); *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (finding an attorney rendered deficient performance when he provided advice that was "flatly incorrect"); *Maples v. Stegall*, 340 F.3d 433, 439 (6th Cir. 2003) (holding that providing "patently erroneous" legal advice is deficient performance); *Magana*, 263 F.3d at 550 (holding that counsel's "complete ignorance of the relevant law under which his client was charged, and his consequent gross misadvice to his client regarding the client's potential pris sentence, certainly fell below an

objective standard of reasonableness under prevailing professional norms"); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) ("Mr. Girard's recitation of the law . . . was clearly wrong . . . and cannot be said to constitute reasonable strategy."); *see also McAdoo v. Elo*, 365 F.3d 487, 499 (6th Cir. 2004) (stating that if counsel incorrectly advised petitioner about maximum prison sentence before a guilty plea. a petitioner's "argument that his counsel's performance was deficient may have merit"). The state court's conclusion to the contrary is unreasonable.

It is important to note that this is not a case where petitioner's counsel merely offered a prediction about the outcome of the trial, which is how respondent attempts to frame the issue on appeal. In the evidentiary hearing before the state trial court, both petitioner and his counsel testified – and the state trial court found, see 28 U.S.C. § 2254(e)(1) – that counsel informed petitioner that a conviction for assault with intent to commit murder "could not" occur given the medical evidence. At the post-trial hearing, McClain testified that the assault with intent to commit murder charge "could not be supported by the evidence," (R. 20, Tr. at 15), petitioner testified that he was told that a jury "couldn't find [him] guilty of the charge [of assault with intent to commit murder] because the woman was shot below the waist," (*id.* at 31), and the trial court concluded that petitioner and his counsel "were convinced that [conviction of assault with the intent to murder] couldn't occur." (*id.* at 74.) If something "could" happen, then it is possible, however unlikely; if it "could not," it is impossible. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that a conviction may stand only if "*any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt" (first emphasis in original)). Counsel here advised petitioner that a conviction was not possible, even though it was. As the district court held, this erroneous advice

was objectively unreasonable, and was indisputably so. The state court's decision to the contrary unreasonably applied *Strickland* and *Hill*.

2. Prejudice

Moreover, petitioner was prejudiced by his counsel's deficient performance. He testified that, had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the state's offer. Nevertheless, although this evidence is uncontradicted, the state suggests that petitioner cannot show prejudice with his "own self-serving statement." Appellant's Br. at 27. There is no legal basis for us to impose a requirement that habeas petitioners provide additional evidence, and we have declined to create this rule in the past. *Magana*, 263 F.3d at 547 n.1; *see also Dedvukovic v. Martin*, 36 F. App'x 795, 798 (6th Cir. 2002). To do so would contradict the Supreme Court's holdings that petitioner need only establish a "reasonable probability" that the result would have been different. *See Hill*, 474 U.S. at 59. Moreover, even if we were to require independent corroboration, McClain confirmed that petitioner was open to pleading guilty, and the significant disparity between the prison sentence under the plea offer and exposure after trial lends credence to petitioner's claims. *See Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003) (collecting cases for the proposition that "the disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer"). In fact, the plea offer of 51 to 85 months was lower than petitioner would receive on the felon in possession of a firearm charge alone.

Respondent points to two facts that it believes casts doubt on petitioner's claim that he would have pleaded

guilty but for counsel's advice. First, respondent points to petitioner's indication in a letter a desire to plead guilty to a lesser charge, and his assertion that he did not intend to kill Mundy. Petitioner's hope for a still more favorable plea deal (and attempt to negotiate one) does not mean he would never accept a higher offer. To the contrary, his interest in negotiating a plea shows that he was not set on going to trial. Petitioner's denial at one point in time that he intended to kill the victim does not mean he could not later recant and admit his guilt to the court. Nor does it mean, as respondent contended during oral argument, that his plea could not be accepted by the court unless he admitted his intent to kill. Under Michigan law, the trial court could accept petitioner's plea to assault with intent to commit murder even were he to continue to disclaim an intent to kill. *People v. Haack*, 396 Mich. 367, 376-77, 240 N.W.2d 704, 709 (1976) (rejecting defendant's argument that his denial of an intent to kill precluded his conviction pursuant to his guilty plea to assault with intent to commit murder, stating "[d]isclaimers by the defendant during the plea taking . . . of intent to kill . . . do not preclude acceptance of a plea since on defendant's own recital a jury could properly infer the requisite participation or intent").

Respondent also argues that the fact that petitioner did not assert his desire to plead guilty at the pretrial conference belies his post-conviction claim that he would have accepted the plea but for his attorney's bad advice. This argument is wholly without merit. Petitioner does not contend that he wanted to accept the plea offer *despite* counsel's advice. He contends instead that he did not plead because his attorney misinformed him of the applicable law.

Despite the clear and uncontroverted evidence indicating that petitioner would have pleaded guilty and

received a lower sentence but for his attorney's poor advice, respondent nevertheless contends that there is no prejudice because petitioner received a fair trial, which is all that the Sixth Amendment is meant to preserve. "No federal circuit case so holds," *Williams v. Jones*, 571 F.3d 1086, 1093 (10th Cir. 2009), and this circuit has consistently rejected such a myopic view of prejudice from a deprivation of the right to counsel. *United States v. Morris*, 470 F.3d 596, 600 (6th Cir. 2006); *Magana*, 263 F.3d at 547; *Turner v. State of Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reaffirmed*, 940 F.2d 1000 (6th Cir. 1991).

The Supreme Court has "recognize[d] the importance of counsel during plea negotiations," *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (citing *Brady v. United States*, 397 U.S. 742, 758 (1970)), and therefore the accused has the right to be represented by counsel during this "critical stage." *King v. Bobby*, 433 F.3d 483, 490 (6th Cir. 2006). In this case, petitioner was denied this right. As a result, he received a prison sentence four times greater than that promised by the plea deal. *See Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991) ("In this case, it is clear what injury [petitioner] suffered. Instead of being sentenced for 15 to 25 years of incarceration, he received a sentence of life imprisonment without parole."). To say that there is no prejudice because the petitioner ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants. As the Supreme Court has recognized:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced

> idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971). Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel. Thus, he has established prejudice. And, to the extent that the state court reached the question of prejudice,[4] its rejection of his *Strickland* claim represents an unreasonable application of clearly established Constitutional law, as established by the Supreme Court.

3. Remedy

Finally, respondent contends that, even if petitioner has established a valid ineffective assistance of counsel claim, there is no clearly established Supreme Court law

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[4] We note again that it is highly unlikely that anything in either cursory ruling of the trial court or appellate court could be construed as addressing the prejudice prong of petitioner's ineffective assistance claim. In these situations, de novo review by federal courts is appropriate. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim de novo.").

supporting the district court's remedy, and the remedy "violates separation of powers, federalism principles, and basic fairness principles."

The absence of clearly established law by the Supreme Court is not relevant when fashioning a habeas remedy. We have already concluded that petitioner is in custody in violation of the Constitution of the United States, *see* 28 U.S.C. § 2254(a), and the state court's conclusion to the contrary represents an unreasonable application of clearly established Federal law, as determined by the Supreme Court, *see* 28 U.S.C. § 2254(d)(1). We must now decide whether the district court's remedy for petitioner's unlawful custody is appropriate.

"[F]ederal courts have wide latitude in structuring the terms of habeas relief." *Demis v. Sniezek*, 558 F.3d 508, 515 (6th Cir. 2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)); *see also* 28 U.S.C. § 2243 (providing that the federal court "shall . . . dispose of the matter as law and justice require"); *Glenn v. Dallman*, 686 F.2d 418, 423 (6th Cir. 1982) (noting that federal courts in habeas cases are "to fashion relief as justice requires"). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Therefore, "'a federal district court . . . should give careful consideration to the appropriate demands of comity in effectuating its habeas corpus decree.'" *Gentry v. Deuth*, 456 F.3d 687, 697 (6th Cir. 2006) (quoting *Parisi v. Davidson*, 405 U.S. 34, 46 (1972)). We review the district court's remedy for an abuse of discretion. *Id.*

The district court did not abuse its discretion. The relief chosen by the district court remedies the constitutional violation without unduly infringing upon the state's interests. The deprivation of effective assistance from counsel caused petitioner to reject a plea deal. Allowing petitioner an opportunity to assess and accept the plea deal, with the competent assistance of counsel, remedies this wrong. *See Lewandowski*, 949 F.2d at 889 ("The only way to effectively repair the constitutional deprivation [petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred; namely, serving a sentence for 15 to 25 years."). A new trial does not. *Turner*, 858 F.2d at 1207 ("[A] new trial cannot remedy the specific deprivation suffered.").

While respondent does not identify any state interests offended by the relief ordered, there are such interests to be taken into account. Nevertheless, the district court's relief treads quite lightly upon these. The district court did nothing more than hold the state to a deal the state had previously offered.[5] In fact, the remedy chosen by the district court is the same remedy that the state courts employ in such cases. *People v. McCauley*, --- N.W.2d ----, 2010 WL 173597 (Mich. Ct. App. 2010); *People v. Carter*, 190 Mich. App. 459, 463, 476 N.W.2d 436, 438-39 (1991), *vacated on other grounds by* 440 Mich. 870, 486

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[5] Although the district court indicates at one point that it is ordering "specific performance" of the plea deal, it later clarifies that it is simply granting a conditional writ, giving the state an opportunity to offer a plea deal or release the petitioner from custody. Thus, the prosecution has a choice: it need not offer petitioner the plea deal, but if it chooses not to, it may not continue to detain petitioner pursuant to a void judgment. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 368-69 (6th Cir. 2006).

N.W.2d 740 (1992). Significantly, respondent does not identify an alternative remedy that it would prefer, apparently content to leave the constitutional violation unremedied. That option does not even attempt to balance the competing interests, assigning no weight to the constitutional rights of the accused. And even assuming that respondent's suggested "balance" of interests is a reasonable one, it hardly demonstrates that the district court's decision constitutes an abuse of discretion. To the contrary, we have repeatedly concluded that this relief is appropriate under such circumstances. *Satterlee*, 453 F.3d at 368-69; *Morris*, 470 F.3d at 600; *United States v. Allen*, 53 F. App'x 367, 373-74 (6th Cir. 2002); *Lewandowski*, 949 F.2d at 889.[6] We find no error in the remedy ordered by the district court.

CONCLUSION

Accordingly, we AFFIRM the district court's grant of habeas relief.

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[6] It is true that some of our cases permit the prosecution an opportunity to offer a plea different from the one previously offered. *Magana*, 263 F.3d at 553; *Turner*, 858 F.2d at 1208-09. In these cases, if the prosecution offers a plea deal in excess of its previous offer (or refuses to offer any plea deal), it must rebut a presumption of prosecutorial vindictiveness during a hearing before the district court. Respondent does not argue that this remedy would be preferable to the district court's election, so we do not consider this possibility further.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY COOPER,
Petitioner,

Case No. 06-11068
Honorable Denise Page Hood

v.

BLAINE LAFLER,
Respondent.
_____/

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus Under 28 U.S.C. §2254 **[Docket No. 1]**, and in accordance with the Opinion and Order Granting Petition for Writ of Habeas Corpus entered on March 26, 2009,

IT IS HEREBY ORDERED that the "Petition for Writ of Habeas Corpus" **[Docket No. 1 filed March 13, 2006]** is **GRANTED**.

DAVID WEAVER
CLERK OF THE COURT
BY: s/ Wm. F. LEWIS
DEPUTY CLERK

APPROVED:

s/ DENISE PAGE HOOD
HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT COURT

Dated: March 26, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY COOPER,
Petitioner,

Case No. 06-11068
Honorable Denise Page Hood

v.

BLAINE LAFLER,
Respondent.
_____/

OPINION AND ORDER
CONDITIONALLY GRANTING
PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner Anthony Cooper ("Petitioner"), a state inmate currently imprisoned at the Oaks Correctional Facility in Manistee, Michigan, through counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is being held in violation of his constitutional rights. Petitioner was convicted of (1) assault with intent to murder, MICH.COMP.LAWS § 750.83, (2) possession of a firearm by a felon, MICH.COMP.LAWS § 750.224f, (3) felony firearm, MICH.COMP.LAWS § 750.227b, and, (4) possession of marijuana, MICH.COMP.LAWS § 333.7403(2)(d). Following his convictions, Petitioner was sentenced by the trial court to (1) 185 to 360 months imprisonment for the assault-with-intent-to-murder conviction, (2) one to five years imprisonment for the felon-in-possession conviction, and, (3) two years imprisonment for the felony-firearm conviction. Petitioner received a suspended sentence for the marijuana conviction. For the reasons stated below,

the Court conditionally grants Petitioner's petition for writ of habeas corpus.

II. STATEMENT OF FACTS

This case arises out of an incident that occurred on March 25, 2003, in Detroit, Michigan. On that particular day, at about 7:00 p.m., Kali Mundy drove to an apartment building on the corner of Schoolcraft and Glastonbury Streets in Detroit, Michigan. Ms. Mundy went to that apartment building in order to visit Robert Smith, a man whom she knew as "Pumpkin." Ms. Mundy wanted to ask Mr. Smith about some problems that had occurred earlier that day at a McDonalds' franchise in Dearborn, Michigan. Ms. Mundy previously suggested that Mr. Smith apply for a job at that McDonalds, but subsequently discovered that he had an altercation with a cashier and a manager. According to Ms. Mundy's testimony, she was informed by the employees that the altercation almost became a pushing match, so much so that they were contemplating calling the police but did not.

As a result, Ms. Mundy decided to go to Mr. Smith's apartment to find out what had actually occurred. According to Ms. Mundy's testimony, when she knocked on his door, it was his girlfriend, not Mr. Smith, who came to the door. Following a quick conversation with the girlfriend, Ms. Mundy left and went outside to use a payphone. After using the phone, Ms. Mundy went to her car, but as she was getting into her car, she saw a red Ford Explorer pull up to the complex. Ms. Mundy believed that Mr. Smith was in the car.

As Ms. Mundy was getting out of her car, she saw Petitioner, whom she recognized from the neighborhood, get out of the Explorer. Ms. Mundy said that as he was

walking toward her, she saw him pull out a gun. It was her testimony that he just started "shooting at me." (Trial Tr. Vol. II, p. 142.) According to Ms. Mundy's testimony, she then ran to a neighbor's house, knocked on the door, and asked the neighbor to call the police. Ms. Mundy had been shot in the abdomen and the back.

Officer Aubrey Sargent was first to arrive at the scene. Officer Sargent testified that, when she arrived at the scene, she found that Ms. Mundy had been shot in the stomach and the back. Officer Sargent said that Ms. Mundy gave her a description of the man who shot her.

Police Officer Randell Coleman, who was in the area securing the scene of an unrelated shooting, testified that, around 7:00 p.m. that evening, he heard some screams and some gunshots. He said that he saw a man in a dark-hooded jacket running toward Schoolcraft Street. Officer Coleman testified that he saw a muzzle flash from the handgun that the man carried.

Officer Lori Dillon and, her partner, Officer Demetrius Brown were also in the area. They heard the gunshots and received a radio call from Officer Coleman, who indicated to them that the alleged suspect was running through an alley in which they were located. Officer Dillon testified that she then pulled into the alley in front of the running man, whom she later identified as Petitioner. Officer Dillon conducted a search of Petitioner and found two packets of marijuana on his person. At the time of Petitioner's arrest, Officer Dillon testified that he was wearing a dark-hooded sweatshirt. Officer Dillon also testified that she found four shell casings from an automatic weapon in the area around the apartment building; however, the gun was not found.

Dr. Ilan Rubenstein, the surgeon who treated Ms. Mundy testified that Ms. Mundy spent almost three weeks in the hospital for the treatment of her gunshot wounds. It was also his testimony that she suffered potentially fatal injuries from the four gunshot wounds in her abdominal cavity; she sustained two bullets holes in her right buttock, one to the hip, and one to the right side of her abdomen. As a result of those injuries, Ms. Mundy sustained major damage to her small and large intestines, which had to be surgically repaired. Although Ms. Mundy claimed that she suffered a miscarriage from the injuries that she received, the medical records did not demonstrate that she was pregnant at the time of the shooting.

Tava Simon, a witness for the defense, testified that Mr. Smith called her on the day in question and asked her if she could take him to a job interview. Mr. Smith was at Petitioner's house at the time, which was down the street from where Ms. Simon worked. Mr. Smith walked down to meet Ms. Simon and, according to her testimony, she took him, along with Petitioner and his friend Yolanda, to the McDonalds, where he was going for the interview. While there, she became aware of a confrontation that occurred inside the McDonalds, between Mr. Smith and one of the female workers. According to Ms. Simon, the female employee was threatening to strike Mr. Smith. It was Ms. Simon's testimony that they subsequently left McDonalds to go to Mr. Smith's apartment.

According to Noel Pettawana, Mr. Smith's fiancé, Ms. Mundy came to her apartment, looking for him. She testified that she ordered Ms. Mundy to leave the apartment; "[b]ecause of her intentions. What I felt her intentions were. I had children in the house." (Trial Tr. Vol. IV, p. 206.) Subsequently, Ms. Pettawana called Ms. Simon, who was driving Mr. Smith, Petitioner, and

Yolanda, and told her what had transpired at the apartment with Ms. Mundy.

A gunshot residue test was performed on Petitioner by Officer Eugene Fitzhugh of the Crime Scene Unit at the Sixth Police Precinct in Detroit, Michigan. Petitioner's hands and face were analyzed. Prior to performing the test, Officer Fitzhugh asked Petitioner some questions. In response, Petitioner denied that he had possessed or had been in the vicinity of a fired gun. Petitioner answered those questions at the police station following his arrest and placement in handcuffs. Officer Fitzhugh did not testify to any waiver of *Miranda* rights prior to the questioning.

William Steiner, a forensic chemist at the Detroit Crime Lab, tested the samples taken from Petitioner; all three samples tested positive for gunshot residue. Mr. Steiner testified that the residue remains for a few hours after a shooting and signifies that an individual either fired a gun, stood in close proximity to a fired gun, or handled a recently fired gun.

Petitioner did not testify.

At a pretrial conference held on May 16, 2003, the assistant prosecuting attorney offered a plea agreement to Petitioner regarding his assault-with-intent-to-murder conviction and his felony-firearm conviction, agreeing to dismiss the other two charges. Defense counsel requested a trial date, while he and the prosecutor agreed to continue negotiations.

At the final pretrial conference on July 17, 2003, the prosecutor offered another plea agreement of fifty-one to eighty-five months for the assault-with-intent-to-murder conviction, despite the fact that the guidelines called for

eighty-one to one-hundred-and-thirty-five months. Defense counsel rejected the offer because he thought that the prosecutor could not prove assault-with-intent-to-murder at trial. In response, the prosecutor withdrew the offer. At the conclusion of the hearing, defense counsel stated that he had talked with Petitioner and that they were rejecting the offer; "I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer." (Pre-trial Conference Tr., p. 5.)

Then, prior to jury selection, on the day of trial, a new prosecuting attorney extended another plea agreement regarding the assault-with-intent-to-murder charge, which was within the guidelines of 126 to 210 months, with an additional two years for the felony-firearm charge. The agreement was such that the felon-in-possession and possession-of-marijuana charges, and the habitual offender, second, would be dismissed. Defense counsel rejected the plea. The case went to trial, and, the jury convicted Petitioner as charged.

Subsequently, Petitioner filed his appeal as of right in the Michigan Court of Appeals raising the following three issues:

> I. Defense counsel rendered ineffective assistance, under the state and federal constitutions, where he failed to convey the sentencing benefits of the plea offer to [Petitioner] and ignored his desire to plea guilty.
>
> II. Defense counsel rendered ineffective assistance, under the state and federal constitutions by failing to present a proper defense.

> III. Where no *Miranda* rights were provided, defense counsel's failure to move to suppress [Petitioner's] statement constituted ineffective assistance of counsel.

While his appeal was pending, in April 2004, Petitioner filed a motion for a new trial, and an evidentiary hearing was held in Wayne County Circuit Court, regarding defense counsel's effectiveness. The hearing addressed the plea-bargaining stage of Petitioner's defense.

At the hearing, defense counsel testified to the following: Defense counsel said that he received Ms. Mundy's medical records in this case prior to the pre-trial conference that was held on July 17, 2003. He said that, based on his review of those records, he felt that the information in the records could not support the claims of the complainant, nor did that information support the charge of assault-with-intent-to-murder, based on the nature of Ms. Mundy's injuries. According to defense counsel's testimony, he said that he expressed his view to Petitioner and advised him that he "could successfully negotiate a plea under the amended charge of [assault with- intent-to-do-great-bodily-harm-less-than-murder]." (*Ginther* Hearing Tr., p. 7.) Accordingly, defense counsel informed the trial court that Petitioner would not be pleading guilty to assault-with-intent-to-murder for fifty-one to eighty-five months.

During the *Ginther* hearing, defense counsel acknowledged that Petitioner did in fact express an interest in a plea agreement. However, it was defense counsel's opinion that he could get Petitioner "a more reasonable offer," later in the proceedings, from a different prosecuting attorney. Defense counsel did not request time

to discuss that matter with Petitioner, rather, it was his testimony that he wanted to explore a plea offer after he reviewed the medical records more thoroughly.

Petitioner rejected the plea offer after defense counsel told him that he could get a better offer for the lesser charge of assault-with-intent-to-cause-great-bodily-harm. Defense counsel told Petitioner that he did not believe that the assault-with-intent-to-murder charge was colorable, in light of the medical records. At the hearing, defense counsel admitted that, in his experience, an offer at trial generally would not improve over a pre-trial offer. Defense counsel acknowledged that he discussed a self-defense claim with Petitioner but advised him that, given the facts, self-defense was not a meritorious claim.

At the *Ginther* hearing, Petitioner expressed, in two letters written to the trial judge, that he intended to plead guilty. However, he said that he rejected the offer of fifty-one to eighty-five months on the basis of defense counsel's advise; "[m]y lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist." (*Ginther* hearing Tr., p. 31.) Rather, Petitioner testified that defense counsel told him that he could get a plea agreement for great-bodily harm with guidelines of eighteen to eighty-four months.

It is Petitioner's position that defense counsel never informed him that a jury might find him guilty of assault-with-intent-to-murder, and that he could face two to three times the plea offered by the prosecution. Rather, Petitioner testified at the *Ginther* hearing that "[h]e told me that the prosecution couldn't prove his case because the person was shot below the waist and that's not attempted murder. It was [great-bodily] harm and that he was going to get me a plea bargain." (*Ginther* hearing Tr., p. 33.) It is Petitioner's position that he would have

accepted the fifty-one to eighty-five months' offer, if counsel had explained that a jury would likely find him guilty of the assault-with-intent-to-murder charge. Petitioner said that he rejected the fifty-one to eighty-five-month offer because he came to court on the final pre-trial conference date, expecting the prosecution to offer him a plea bargain that would include eighteen to eighty-four months imprisonment.

Following arguments on the motion for a new trial, and the *Ginther* hearing on Petitioner's ineffective assistance of counsel claim, the trial court denied the motion.

On March 15, 2005, the Michigan Court of Appeals issued an unpublished *per curiam* opinion affirming Petitioner's convictions. *People v. Cooper*, No. 250583, 2005 WL 599740, 2005 Mich. App. Lexis 679 (Mich. Ct. App. Mar. 15, 2005) (*per curiam*). Petitioner then filed an application for leave to appeal that decision in the Michigan Supreme Court. The Michigan Supreme Court denied Petitioner's application on October 31, 2005. *People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (2005) (table).

On March 13, 2006, Petitioner, through counsel, filed the pending petition for a writ of habeas corpus, asserting that his constitutional rights were violated. Petitioner states the following:

> I. Trial counsel rendered incompetent advice during the plea bargaining process which denied [Petitioner] the effective assistance of counsel.

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this Court's habeas corpus review of state court decisions. Specifically, 28 U.S.C. § 2254(d) states in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under (d)(1), a federal court may grant a writ of habeas corpus under two different clauses, both of which provide two bases for relief. Under the "contrary to" clause, a federal court may grant habeas relief if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has decided on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The words "contrary to" should

be construed to mean "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.*

Under the "unreasonable application" clause, a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts. *Id.* at 407-08. Relief is also available under this clause if the state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. *Id.* at 407; *Arnett v. Jackson*, 393 F.3d 681, 686 (6th Cir. 2005). The proper inquiry for the "unreasonable application" analysis is whether the state court decision was "objectively unreasonable" and not simply erroneous or incorrect. *Williams*, 529 U.S. at 407; *Lordi v. Ishee*, 384 F.3d 189, 195 (6th Cir. 2004).

In analyzing whether a state court decision is "contrary to" or an "unreasonable application" of clearly established Supreme Court precedent, a federal court may only look to the holdings, as opposed to dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Williams*, 529 U.S. at 412.

IV. ANALYSIS

A. Ineffective Assistance of Counsel Claim

Petitioner contends that he is entitled to habeas relief because trial counsel was ineffective. Specifically, Petitioner argues that counsel was constitutionally deficient during the plea-bargaining process. Petitioner claims that his attorney erroneously advised him to reject the State's offer of fifty-one to eighty-five-months sentence

on the assault-with-intent-to-murder charge, and that he relied on that recommendation and rejected the offer without competent advise from his attorney. Petitioner claims that trial counsel failed to fully inform him and that his rejection of the offer was not knowing or intelligent. Petitioner therefore is seeking specific performance of the plea offer.

To establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

With respect to the performance prong of the *Strickland* test, a petitioner must identify acts that were "outside the wide range of professionally competent assistance," in order to prove deficient performance. *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302,

1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686).

In a guilty plea context, while the performance prong of the *Strickland* test remains the same, to establish prejudice the petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Similarly, where counsel gives erroneous advice that results in the petitioner going to trial, the issue is whether there is a reasonable probability that the petitioner would have pleaded guilty. *Magana v. Hofbauer*, 263 F.3d 542, 551-53 (6th Cir. 2001); *see also Guerrero v. United States*, 383 F.3d 409, 416-17 (6th Cir. 2004) (prejudice established by defendant's demonstrating a reasonable probability that if he had been notified of a plea offer, he would have accepted it). Counsel's failure to provide professional guidance to a defendant regarding his sentence exposure prior to rejecting a plea offer may satisfy both the performance and prejudice prongs of the *Strickland* test. *Smith v. United States*, 348 F.3d 545, 553-54 (6th Cir. 2003).

The Michigan Court of Appeals, the last court to issue a reasoned decision regarding this claim in this case, stated in pertinent part:

> Defendant raises several claims of ineffective assistance of counsel. The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v. LeBlanc*, 465 Mich 575, 578; 640 NW2d 246

(2002). To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v. Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v. Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant challenges the trial court's finding after a *Ginther* hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. *However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial.* The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.

Cooper, No. 250583, 2005 WL 599740, slip op. at 1-2 (Emphasis added) (Footnote omitted.)

In this case, the Court finds that the Michigan Court of Appeals' decision unreasonably applied the standards set forth in *Strickland* and *Hill, supra*. First, the Michigan Court of Appeals mis-characterized the proper analytical framework by scrutinizing Petitioner's conduct as opposed to examining trial counsel's omissions. It stated: "*defendant knowingly and intelligently rejected two plea offers and chose to go to trial.*" *Cooper*, No. 250583, 2005 WL 599740, slip op. at 2 (Emphasis added). It then dismissed Petitioner's claim in a two-sentence analysis, without addressing the issue.

Rather, the question before the Michigan Court of Appeals was not the legitimacy of Petitioner's plea decision but the validity of trial counsel's underlying advice and whether that advice was objectively reasonable. The Michigan Court of Appeals made Petitioner's plea decision the centerpiece of its analysis. In so doing, the Michigan Court of Appeals unreasonably applied clearly established federal precedent. *Strickland*, 466 U.S. at 690 ("a court deciding an . . . ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case"); *Hill*, 474 U.S. at 56 ("[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'").

Second, the Michigan Court of Appeals failed to consider any evidence from the postconviction hearing on the question of counsel's ineffectiveness. The records demonstrates that defense counsel stuck to a one-sided

view of the case; he professed many times in open court that the state could not prove its case. At the preliminary hearing, defense counsel stated, on three different occasions, "the evidence will show that there is insufficient evidence," "I believe that the Prosecution does not have the evidence to try to (sic) this case," and "I am fully prepared to prove that they do not have sufficient evidence." (Preliminary Hearing Tr., p. 3; *Ginther* Hearing Tr., pp. 6-7, 10.)

According to defense counsel's testimony at the *Ginther* hearing, he told the trial judge that he believed that the prosecutor had no case because the victim's injuries simply did not support an assault-with-intent-to-murder charge. (*Ginther* Hearing Tr., pp. 6, 13.) That testimony corroborated Petitioner's statement that "my lawyer told me that they couldn't find me guilty . . . because the woman was shot below the waist." (*Ginther* Hearing Tr., p. 31.)

During the *Ginther* hearing, defense counsel acknowledged that Petitioner was open to considering plea offers by the prosecution. (*Ginther* Hearing Tr., p. 7.) However, it was defense counsel's position that Petitioner should reject the plea for the following reasons: (1) the victim's injuries did not satisfy the necessary elements for the charge of assault-with-intent-to-murder; (2) the prosecutor's offer was unreasonable; and (3) defense counsel believed that he could negotiate a better plea to a lesser charge. (*Ginther* Hearing Tr., pp. 6-8, 13-14.) None of those bases for counsel's advice withstands reason.

First, a jury could, and, in fact, did, in this case, believe that Ms. Mundy's potentially fatal injuries could support a charge of assault-with-intent-to-murder; the testimony revealed that Ms. Mundy was shot from behind–the bullets punctured her bowels, for which she

had to have surgery and a hospital stay of about three weeks. Second, the prosecutor's offer of four to seven years was not unreasonable when compared with the possibility that Petitioner could have been sentenced to life imprisonment. And, finally, defense counsel's belief that he could negotiate a lesser charge was unreasonable in light of the facts that defense counsel himself admitted– "only in the rare case does the prosecutor's offer improve between the final conference and the start of trial." (*Ginther* Hearing Tr., pp. 18-19.) The Michigan Court of Appeals failed to take into account the foregoing evidence. That failure was an erroneous application of clearly established federal law. Therefore, this Court finds that habeas relief is warranted on Petitioner's claim of ineffective assistance of counsel.

Now, the question becomes what is the appropriate habeas remedy in this case. A federal habeas court has broad discretion in conditioning a judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). 28 U.S.C. § 2243 authorizes federal courts to dispose of habeas matters "as law and justice require." In certain circumstances, federal courts have conditioned the issuance of a writ on the state's conducting proceedings narrower than a full retrial. *See Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998). Such cases make clear that conditional writs must be tailored to ensure that all constitutional defects will be cured by the satisfaction of that condition. *Id.* Cases involving deprivations of the Sixth Amendment right to the assistance of counsel are likewise subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation. *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

Several federal courts have granted specific performance where ineffective assistance of counsel deprived a defendant of an opportunity to accept a plea offer. *See e.g., United States v. Blaylock*, 20 F.3d 1458, 1468-69 (9th Cir. 1994) (requiring reinstatement of plea offer as the remedy to restore defendant to his original position before the Sixth Amendment violation occurred); *Lewandowski v. Makel*, 949 F.2d 884, 887, 889 (6th Cir. 1991) (upholding district court's decision to grant specific performance of plea agreement and upholding original sentence imposed pursuant to plea bargain); *Satterlee v. Wolfenbarger*, 374 F.Supp.2d 562, 569 (E.D. Mich. 2005) (allowing specific performance where counsel was ineffective for failing to communicate government's offer to defendant).

Consequently, the Court finds that Petitioner's counsel relied on a misapprehension of the law and facts in advising him to reject the plea, and, in reviewing Petitioner's ineffective assistance of counsel claim, the Michigan Court of Appeals unreasonably applied federal precedent. Therefore, pursuant to the aforementioned cases, the Court finds that the most appropriate remedy is to grant a writ of habeas corpus ordering specific performance of Petitioner's original plea agreement, for a minimum sentence in the range of fifty-one to eighty five months, the plea Petitioner would have accepted if counsel had been competent.

V. CONCLUSION

For the reasons stated above, this Court concludes that Petitioner is entitled to federal habeas relief on the claim of ineffective assistance of counsel.

VI. ORDER

IT IS HEREBY ORDERED that Petitioner's application for writ of habeas corpus is conditionally granted, unless the State takes action to offer Petitioner a plea offer with a sentence agreement of fifty-one to eighty-five months, within sixty (60) days from the date of this opinion. Petitioner may apply for a writ ordering Respondent to release him from custody if the state fails to act or after all appeals are final.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: March 26, 2009

Order **Michigan Supreme Court**
Lansing, Michigan

October 31, 2005

128650

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 128650
COA: 250583
Wayne CC: 03-004617-01

ANTHONY GLADNEY COOPER,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the March 15, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 31, 2005 Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 15, 2005

v

No. 250583
Wayne Circuit Court
LC No. 03-004617-01

ANTHONY GLADNEY COOPER,
Defendant-Appellant.

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224(f); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to prison terms of 185 to 360 months for the assault conviction, one to five years for the felon in possession conviction, and two years for the felony firearm conviction. Defendant received a suspended sentence for the marijuana conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting of Kali Mundy outside of an apartment building in Detroit. Mundy was shot twice in the buttocks and suffered internal injuries requiring surgery.

Defendant raises several claims of ineffective assistance of counsel. The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant challenges the trial court's finding after a *Ginther*[1] hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.

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[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Review of defendant's remaining claims of ineffective assistance is limited to mistakes apparent on the record because no *Ginther* hearing was held with regard to these claims. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant first asserts that defense counsel's trial strategy was unsound because counsel was unsuccessful in getting testimony admitted into evidence regarding conflicts between Mundy and the defense witnesses. Defendant cannot overcome the presumption of sound trial strategy, however, because the record is insufficient to verify this allegation of ineffective assistance. *Williams*, *supra* at 414.

Defendant also contends that defense counsel failed to impeach Mundy's testimony that the shooting caused her to suffer a miscarriage with evidence from her medical records indicating that she was not pregnant when she was shot. The decision to call or question witnesses is presumed to be a matter of trial strategy, and the failure to do so constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). In light of the medical testimony that Mundy did not suffer any ovary or uterine injuries any failure to impeach Mundy regarding this issue was not outcome determinative.

Defendant further contends that defense counsel failed to establish that Mundy had a motive to fabricate her testimony based on defendant's assertion that she possessed a gun in violation of her probation. Because the

record is insufficient to support this claim, defendant has not carried his burden and established his claim. *Williams, supra* at 414.

Defendant also maintains that defense counsel failed to move to suppress defendant's answers to questions asked before the performance of a gunshot residue test. The record is silent with regard to whether defendant was advised of his *Miranda*[2] rights before he was questioned. Therefore, the record is insufficient to verify this allegation of ineffective assistance of counsel. *Williams, supra* at 414.

Finally, because defendant has not established any errors prejudicing his trial, his claim of cumulative error must also fail. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694, reh den sub nom *California v Stewart*, 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

vs Case No. 03-4617

ANTHONY GLADNEY COOPER /

PRETRIAL

PROCEEDINGS held and testimony given in the above-entitled matter before the Honorable BRUCE U. MORROW, Judge of the Third Circuit Court, Courtroom 404, Frank Murphy Hall of Justice, 1441 St. Antonie, Detroit, Michigan 48226, on July 17, 2003.

* * *

[Page 2]

JULY 17, 2003
FRANK MURPHY HALL OF JUSTICE
DETROIT, MICHIGAN
PROCEEDINGS

THE COURT: This is the People of the State of Michigan versus Anthony Cooper, docket number 03-4617. Appearances please.

MR. SKYWALKER: Good morning, your Honor, Luke Skywalker appearing on behalf of the People of the State of Michigan.

MR. McCLAIN: Good morning, your Honor, Brian McClain on behalf of Mr. Cooper. Mr. Skywalker and I met a couple of days ago to discuss a plea offer. Mr. Cooper is reading the agreement and I wanted to put that on the record.

MR. SKYWALKER: This offer is for today only.

MR. McCLAIN: Your Honor, it's not a reasonable offer really.

MR. SKYWALKER: He's charged with a habitual offense and he was a felon in possession of a firearm. We agreeing that the guidelines would be substantially higher. For the felon in possession it would be 81 to 135 instead of 51 to 85.

MR. McCLAIN: Would you allow me to speak and not ,- interrupt-me. Your, Honor if I may continue. Mr. Skywalker

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contention is that he's not going to try this case. I think the evidence will show that there is insufficient evidence. I just got the memo. By the way we have rescheduled these dates and I just got the medicals, and I have reviewed the nature of the injuries of the person.

After reviewing the medical report, your Honor, I believe that the Prosecution does not have the evidence to try to this case. We're willing to go to trial, but in the interest of Justice and due to the fact that Mr. Skywalker is not trying the case, I would like to discuss this matter with the attorney who will has will make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.

I am fully prepared to prove that they do not have sufficient evidence at trial. I think the medical evidence will show that at trial. I'm sure that Mr. Skywalker doesn't care if I take it or not. He's not making the case

next Wednesday. But the person that will have to make the case next Wednesday will take a more serious look at this and give us a more reasonable offer.

MR. SKYWALKER: It was reasonable when we talked. If you don't like it now, then that's your problem.

MR. McCLAIN: You can address yourself to the Court and not me.

MR. SKYWALKER: This offer is being withdrawn and

[Page 4]
we will tell you whose trying it on the trial date. There will be no offer on trial date because that's policy. I withdraw this offer.

MR. McCLAIN: I am fully prepared to try this case, your Honor, but I know the Court is interested in a possibility for us to resolve this matter. I think it could be resolved.

THE COURT: Resolution is not a plea or a trial. I have no history in obtaining pleas for the purpose of expediency or anything else for that matter. I truly think it's best to have that, but if you think his best defense to go to trial, whether or not he's guilty and they can prove it beyond a reasonable doubt, then so be it. If that is what the young man wants, then that is what the young man will get.

You don't call it a reduced plea. They call it a reduced plea. If they're dismissing something, well then we can go through that. You have to respect the guidelines, then some would think that whatever

ridiculous terms that are used will be beneficial. So, if there's a benefit, then what does it matter if we go to trial.

MR. McCLAIN: You hit the nail on the head. The guidelines are affected by the principal charge not remaining in fact. The guidelines are significantly different from AWIM (Assault With Intent to Murder) to a GBH (Great Bodily Harm). So, that's our principal position on that. So, it is

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significant.

THE COURT: Last but not least, Mr. McClain, you know once this is over, nobody will get that case a day or two days beforehand. Mr. Skywalker is busy on that day or he's simply assigned already. Because the trial prosecutors are the ones that basically convey offers in somebody else's food, I don't think it's Mr. Skywalker's problem. How long the offer stays open, he can control that. As much as you might want, you're not going to offset that.

MR. McCLAIN: That's fine, your Honor. I have little control over what anybody does except for me and my client. I understand that. I'm just putting my position on the record. He can do what he has to do, and what he will do. I look forward to the opportunity to prove my position.

I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer.

THE COURT: See everybody back on that day.
(Whereupon proceedings concluded)

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

vs Case No. 03-04617

ANTHONY COOPER
Defendant /

MOTION

PROCEEDINGS had and testimony taken before the HONORABLE BRUCE U. MORROW, Circuit Court Judge, Frank Murphy Hall of Justice, Detroit, Michigan on Friday, May 28, 2004.

* * *

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* * *

THE COURT: There's a thin line between giving advice and forcing somebody to comply with your advice. I remember my first year of being a criminal defense lawyer, somebody pulled me aside and said, Bruce, the key is that you don't need them to take your advice because if that's your goal you're going to be sorely disappointed all the time. Your responsibility is to give them your advice and then let people make their own decisions. So you know whether it's -- you know and then sometimes I would second guess myself. As I got more experienced I would think that perhaps the reason they didn't take my advice was because I didn't communicate well enough in a way that could let them know that it wasn't just my advice. That it was based on my years of experience and then I would think about

that and I say, well, juries always come back different than what I think. So I didn't have any real basis to say that my opinion was what was going to happen. It was just simply my opinion. At some point you get to that. Where you say, listen, my assessment

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of how things will be played out, I don't think that that's been true more than 50 percent of the time. I just don't know. There are some things that I would hedge my bet on that it couldn't come back, but it's obvious that Mr. Cooper and Mr. McClain didn't believe that the facts as presented in the Preliminary Examination, as in the evidence -- I'm sorry, as in the investigators, as in any of it would support a finding of assault with the intent to murder. Both were convinced that that couldn't occur. It was Mr. Cooper's belief based on his having counsel over in the jail, his being familiar at least with the hierarchy of charges, that at the absolute most if his self-defense claim did not work, that he should only be found guilty of a felonious assault. Everybody in this particular case was interested in a plea bargain. That's what pre-trial conferences are for. To see if there's a lesser included offense, see what it is, see if a person wants to give up any claims of defenses that they might have and decide that it is in their best behalf to go with the plea agreement as opposed to go to trial and based on the conversations that Mr. McClain and Mr. Cooper had, whether you want to call them extensive, non-extensive, I think that there was an understanding between the parties of what

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Mr. Cooper would find acceptable. Now, it might have been based on the representations of Mr. McClain and on hindsight sometimes they would say, you know, that was an out there kind of claim, but any time self-defense

is invoked, the People can say that that's an out there claim. Every legitimate self-defense claim that a defense attorney thinks doesn't result in a not guilty plea. Too many self-defense claims the jury comes back and says, oh, I don't think so and so there's no way to assess I think a self-defense claim until you actually hear it. Both Mr. McClain and Mr. Cooper said that they didn't know if he was going to take the witness stand, but it's plain and it's consistent through Mr. Cooper's -- what he said to Mr. McClain based on Mr. McClain's questions to Preliminary Exam that Mr. Cooper was alleging that Miss Mundy had a weapon and so there was always the claim of self-defense out there that was being explored by Mr. McClain as a result of conversations with Mr. Cooper. Who wouldn't want to plea to something that's the most minimal of situations and there's no question about it. I think the record is straight that they were trying to work out a plea. There's a point where a plea becomes unacceptable and people decide to go to trial and that's what I think that happened in this case. I

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think that that's supported by what Mr. McClain has said and I'm not going to find that there was ineffective assistance of counsel based on this record. Mr. Cooper made his own choices.

MS. NEWMAN: Thank you, Your Honor.

MR. BERNACKI: Thank you, Your Honor.

MS. NEWMAN: Do you want me to submit an order or do you have a court order?

THE COURT: I'm signing the order now.

MS. NEWMAN: Can we have the record transcribed for appellate purposes?

THE COURT: I will so order.

MS. NEWMAN: Thank you.

OPPOSITION BRIEF

No. 10-209

IN THE
SUPREME COURT OF THE UNITED STATES

Blaine Lafler,

Petitioner,

v.

Anthony Cooper,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case presents three questions, none of which are the subject of any disagreement in the federal courts of appeals.

1. Are the federal courts of appeals correct in uniformly holding that the determination of whether a state court decision contravenes clearly established federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA) turns on the actual reasoning used by the state court, not different reasoning advanced by the government on appeal in federal habeas proceedings?

2. Does a state court contravene clearly established federal law by holding that an attorney's grossly erroneous advice to his client to decline a favorable plea offer does not constitute ineffective assistance of counsel if the client makes his own decision to follow that advice?

3. Is an attorney's grossly erroneous advice to decline a plea offer, which directly results in the client receiving a significantly harsher sentence, immune from scrutiny under the Sixth Amendment right to counsel on the ground that the client later received a fair trial?

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BRIEF IN OPPOSITION

Respondent Anthony Cooper respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The State offered respondent a favorable plea agreement that respondent would have accepted but for his lawyer's flatly incorrect advice that he could not, as a matter of law, be convicted of the principal charge against him. Respondent went to trial, where he was convicted and received a substantially longer sentence than the plea offer. The state courts rejected respondent's claim that he had received constitutionally inadequate assistance of counsel, reasoning that respondent had made his own choice to follow his lawyer's advice and reject the plea offer. The Sixth Circuit held that respondent was entitled to a writ of habeas corpus, holding that his attorney's advice to reject the plea based on objectively wrong legal analysis qualified as constitutionally ineffective assistance of counsel.

1. On the evening of March 25, 2003, Kali Mundy parked her car at an apartment complex in Detroit, Michigan. Pet. App. 25a. She exited the vehicle and began walking towards respondent, who pulled out a gun and began shooting. Pet. App. 2a. Ms. Mundy ran, but she was struck in the buttocks and thigh. *Id.* Officers promptly arrested respondent nearby. Pet. App. 2a-3a.

Ms. Mundy's injuries were serious, and her condition was at one point listed as life threatening. Pet. App. 2a. She required surgery and was not released from the hospital for nearly three weeks. *Id.*

2. The State of Michigan charged respondent with various crimes, including assault with intent to murder (AWIM). *See* Mich. Comp. Laws § 750.83.[1] The maximum sentence for AWIM is life in prison. *Id.* § 750.83.

At a pretrial conference on May 16, 2003, prosecutors offered respondent a plea agreement, but no specific sentence length was mentioned and the parties agreed to continue the discussions at a later date. Final Conf. Tr. 4, May 16, 2003. However, as respondent explained, all along he "was intending to enter into a plea . . . [b]ecause I was guilty." *Ginther* Hr'g Tr. 29.

When respondent met with his lawyer, Brian McClain, a few days before a July 17, 2003 pretrial hearing, McClain advised respondent that "they couldn't find [him] guilty of the charge because the woman was shot below the waist." *Ginther* Hr'g Tr. 31. On that basis, McClain advised respondent that prosecutors would reduce the charge to assault with intent to commit great bodily harm less than murder, *see id.* at 30, and would offer him a plea agreement of 18 to 84 months.[2] *Id.* McClain presented his mistaken view not as a prediction of what might happen at trial, but as a

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[1] Respondent was also charged with possession of a firearm by a felon, Mich. Comp. Laws § 750.224f; possession of a firearm at the time of commission of a felony ("felony firearm"), *id.* § 750.227b; and possession of marijuana, *id.* § 333.7403(2)(d). The Brief in Opposition does not discuss those charges at length because they did not play a material role in the plea bargain process.

[2] The plea terms discussed are the range for the minimum sentence.

certainty: McClain advised respondent that "the Prosecution does not have the evidence to try to [sic] this case." Pretrial Tr. 3, July 17, 2003.

It is undisputed that McClain's advice was objectively wrong: no injury at all is required for a conviction of AWIM. *See, e.g., People v. Cochran*, 399 N.W.2d 44 (Mich. Ct. App. 1986) (affirming AWIM conviction where defendant fired one shot into the air). The elements of the offense are instead "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v. Brown*, 703 N.W.2d 230, 236 (Mich. Ct. App. 2005) (quoting *People v. Davis*, 549 N.W.2d 1, 4 (Mich. Ct. App. 1996)).

Relying on McClain's specific advice, respondent intended at his next court date to accept a plea agreement for 18 to 84 months. *Ginther* Hr'g Tr. 50-51. When the parties next met for the July 17 hearing, however, the State offered a plea agreement with a range of 51 to 85 months. *Id.* at 31. McClain stated several times at the hearing that AWIM could not be supported by the evidence, Pretrial Tr. 3, and said that the trial prosecutor, who had not yet been assigned, would "take a more serious look at this and give us a more reasonable offer." *Id.* Eventually, McClain explained that "[w]e're just rejecting the offer." *Id.* at 4, 5.

McClain remained convinced that respondent was innocent of AWIM as a matter of law. Accordingly, he believed that "the attorney who ha[d] [to] make the case for the Prosecution" would make a better plea offer before trial. Pretrial Tr. 3. McClain later conceded that – absent some change in

the evidence – he could not remember the State ever offering a more generous plea offer right before trial in any other case. *Ginther* Hr'g Tr. 18-19.

On the day of trial, July 23, 2003, the prosecutor offered a new plea agreement. It was worse: a range of 126 to 210 months. *Ginther* Hr'g Tr. 11. The record is silent regarding the rejection of this plea offer, but trial began. *Id.*

Prior to trial, McClain never discussed with respondent how to defend the case. As respondent explained, "[w]e never really got a chance to discuss a strategy," and indeed respondent "never knew [he] was going to trial until the trial started. So [they] didn't discuss that until the trial started." *Ginther* Hr'g Tr. 38.

At trial, the judge's instructions to the jury noted three elements required for an AWIM conviction: first, "that [respondent] tried to physically injure another person"; second, that when respondent committed the assault, he had or believed he had the ability to cause an injury; and third, that respondent intended to kill Mundy when he assaulted her. Jury Instructions Tr. 9. Respondent was found guilty of AWIM and the additional charges, Trial Tr. 253, and was sentenced to 185 to 360 months in prison. Sentencing Tr. 12.

3. Through new counsel, respondent moved in state court for a new trial on the ground that he had received ineffective assistance of counsel in

the plea process. At an evidentiary hearing before the trial court, McClain confirmed that he had told respondent "that the information in the medical report . . . did not support the charge of assault with intent to murder based on the nature of the injuries." *Ginther* Hr'g Tr. 6. McClain stated "[t]hat's the way I felt. That [it] could not be supported by the evidence." *Id.* at 15.

Although respondent urged the trial judge to focus on the erroneous advice McClain gave because "the defendant is suppose[d] to be educated about what's going on and be able to make an *informed* choice," *Ginther* Hr'g Tr. 58 (emphasis added), the trial judge instead rested his decision exclusively on the fact that respondent had chosen to go to trial. The judge recognized that "it's obvious that [respondent] and Mr. McClain didn't believe that the facts as presented . . . would support a finding of assault with the intent to murder. Both were convinced that that couldn't occur." *Id.* at 73. The judge further acknowledged that their beliefs "might have been based on the representations of Mr. McClain and on hindsight sometimes they would say, you know, that was an out there kind of claim." *Id.* at 74. But, he concluded, "I'm not going to find that there was ineffective assistance of counsel based on this record. [Respondent] made his own choices." *Id.* at 75.

4. On respondent's appeal, the Michigan Court of Appeals affirmed. It too rested its decision exclusively on the fact that respondent chose not to plead guilty, without regard to whether he made that choice based on his lawyer's erroneous advice. Pet. App. 45a. The court reasoned that "the

record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. The Michigan Supreme Court denied leave to appeal. Pet. App. 43a.

5. Respondent timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, arguing that the decision of the Michigan Court of Appeals "unreasonably applied clearly established federal precedent" in rejecting his claim of ineffective assistance of counsel by improperly focusing on "the legitimacy of [respondent]'s plea decision, [rather than] the validity of counsel's underlying advice." Petition for Writ of Habeas Corpus 18 (emphasis in original).

Before the district court, the State did not dispute that a lawyer's erroneous advice to his client to reject a plea agreement can amount to constitutionally ineffective assistance of counsel. Instead, it argued that on the facts of this particular case, the state courts correctly rejected respondent's claim on the basis that he alone made the "ultimate decision" to reject the plea offers. Resp. Answer in Opp'n to Pet. for Writ of Habeas Corpus 12. Alternatively, it argued that McClain's plea advice was not "objectively unreasonable," *id.* at 13, and that respondent had not proved "that he would have accepted a plea offer if advised differently by his counsel at the time," *id.* at 14.

The district court granted respondent relief, holding "the Michigan Court of Appeals decision unreasonably applied the standards set forth" by

this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), when it relied on respondent's decision to reject the plea, without taking into account that the decision was based on McClain's objectively unreasonable advice. Pet. App. 38a. The court found that McClain had provided constitutionally deficient advice by "rely[ing] on a misapprehension of the law and facts in advising [respondent] to reject the plea." Pet. App. 41a. Recognizing that the appropriate remedy was a matter of its discretion, the court conditionally granted the writ, requiring the State to offer respondent the initial agreement, with a sentencing range of 4-7 years, or release him. Pet. App. 42a.

6. The State appealed, raising for the first time the question presented by the petition for certiorari: whether respondent's Sixth Amendment rights had been violated in the plea negotiations, given that he assertedly later received a fair trial. Pet'r. C.A. Br. 5. The State argued in the alternative that the state courts' decisions were not contrary to clearly established Supreme Court precedent because a "specific performance" remedy for a plea offer was not clearly established. *Id.* at 12-13. Finally, the State characterized the state trial court as having implicitly held that McClain's advice was reasonable and that respondent had wanted to go to trial: "In stating that [respondent] knowingly and intelligently rejected two plea offers, the State appellate court was effectively saying that trial counsel was not

deficient in conveying the benefits of the plea and inferring" that respondent would not have accepted a plea agreement. *Id.* at 29.

The Sixth Circuit unanimously affirmed the district court's conditional grant of relief. Pet. App. 1a. It agreed that McClain "informed [respondent] of an incorrect legal rule . . . in advising [respondent] not to accept the state's plea offer," and that "such erroneous advice . . . is obviously deficient performance." Pet. App. 14a. It further agreed that McClain's erroneous advice prejudiced respondent, who "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 19a.

Accordingly, the Sixth Circuit found that the Michigan Court of Appeals had unreasonably applied this Court's precedent. It explained that the Michigan Court of Appeals had "failed to appreciate the nature of [respondent]'s claim. Rather than addressing [respondent]'s argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel." Pet. App. 10a. As a consequence, "[e]ven full deference under AEDPA cannot salvage the state court's decision." Pet. App. 11a.

Further, the court held that the remedy chosen by the district court was within its discretion because "[t]he absence of clearly established law by

the Supreme Court is not relevant when fashioning a habeas remedy," Pet. App. 20a, and because the State, "apparently content to leave the constitutional violation unremedied," offered no alternative, Pet. App. 22a.

REASONS FOR DENYING THE WRIT

This case does not warrant this Court's intervention. Not only did the Sixth Circuit correctly state the legal standards for granting habeas corpus relief, but there is also no conflict in the lower courts on any of the legal questions arguably presented by the petition. Further, on the facts of this case, the decision of the state courts was obviously contrary to this Court's precedents. The state courts rejected respondent's claim on the sole ground that he chose not to plead guilty. This Court's cases, by contrast, clearly establish that the relevant inquiry is whether the defendant acted on the basis of his attorney's erroneous advice.

Nor is there merit to petitioner's argument that even flatly incorrect advice from a lawyer that his client reject a favorable plea agreement can never amount to constitutionally ineffective assistance of counsel if the defendant is convicted at a fair trial. This Court's decisions establish that a criminal defendant has a right to accurate legal advice to make an informed plea decision. The plea process is a critical stage of the criminal proceedings; indeed, the overwhelming majority of criminal charges are resolved by plea. Accordingly, a defendant may be prejudiced in violation of his Sixth Amendment right to effective assistance of counsel if he rejects a plea deal on

the basis of his lawyer's erroneous advice and is later subjected to a harsher sentence.

Even if the questions presented by the petition otherwise warranted this Court's review, this case would be a poor vehicle for the resolution of those questions. The Court would more sensibly decide the scope of the Sixth Amendment right to counsel in a case not obscured by AEDPA's standard of review: either a state case on direct review or a federal criminal case. This case in particular is further complicated because the Michigan state court decisions are poorly articulated; because the state courts did not decide the case on the basis invoked by petitioner; because petitioner failures to acknowledge the actual basis on which the state courts ruled; and because petitioner only raised the argument on which it now relies for the first time in the court of appeals.

Accordingly, certiorari should be denied.

I. Certiorari Is Not Warranted To Review The Sixth Circuit's Application Of AEDPA.

The Sixth Circuit correctly applied the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132 (1996). That statute directs federal courts to evaluate the reasoning that the state court employed, which in this case petitioner conspicuously does not defend. There is no serious dispute that the state courts' decisions rejecting respondent's claim on the ground that respondent made the choice to plead guilty are contrary to this Court's clearly established precedents.

A. The Sixth Circuit Applied The Proper Standard Of Review Under AEDPA.

Petitioner does not contend that the Sixth Circuit identified or applied an incorrect legal standard under AEDPA, or that the lower courts are in conflict with respect to that question. AEDPA authorizes a federal court to grant a writ of habeas corpus if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As the Sixth Circuit recognized, a state court decision is contrary to clearly established precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or if it "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." Pet. App. 9a-10a (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

In assessing whether a state court decision is contrary to clearly established federal law, a federal court considers the "grounds" the state court actually advances for its decision, *Williams*, 529 U.S. at 405, including specifically whether the state court "correctly identifies" the governing legal rule, *id.* at 407. The principles of federalism underlying AEDPA require that federal courts respect state courts' actual decisions and avoid imputing to them rationales that they did not employ. Thus, it is the state court's

decision, and not the arguments made by the state's lawyers in federal court, that are due deference under AEDPA.

The federal courts of appeals uniformly hold, consistent with the Sixth Circuit's judgment in this case, that no deference is due under AEDPA to alternative rationales that did not form the basis of the state court's decision. *See, e.g., Revilla v. Gibson*, 283 F.3d 1203, 1220 n.14 (10th Cir.), *cert. denied*, 537 U.S. 1021 (2002); *Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001); *Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir.), *cert. denied*, 534 U.S. 900 (2001); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. 2000), *cert. denied*, 534 U.S. 943 (2001).

In this case, the Sixth Circuit correctly reviewed and rejected the state court's rationale as contrary to this Court's clearly established precedents. *See infra* Section I(B). In rejecting the alternative rationale that the State's lawyers have advanced in federal court, but which the state court conspicuously did not adopt, the court of appeals was not required to employ AEDPA's deferential standard of review. *See infra* Section II. Because the Sixth Circuit correctly applied AEDPA's standard of review, there is no warrant for this Court's involvement.

B. The Sixth Circuit's Application Of AEDPA To The Michigan Court Of Appeals' Decision Was Correct And Unremarkable.

1. Petitioner errs in arguing that in this case the Sixth Circuit contravened AEDPA in granting respondent habeas relief because respondent was subsequently "convicted after a fair and reliable trial." Pet.

9. That assertion fails to account for the critical fact – which the State completely fails to acknowledge – that petitioner's proffered interpretation of the Sixth Amendment was not the basis of the Michigan Court of Appeals' decision and thus is due no deference under AEDPA. The state courts did not invoke the "fair trial" rationale now presented by the petition. The state trial court instead held that respondent's Sixth Amendment rights were not violated because he "made his own choices." Pet. App. 54a. The Michigan Court of Appeals in turn affirmed on the basis that respondent "knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. As the Sixth Circuit recognized, "[r]ather than addressing [respondent's] argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel."[3] Pet. App. 10a.

The actual holding of the Michigan Court of Appeals is contrary to this Court's clearly established precedents. The state court failed to apply the well-established standard for evaluating claims of ineffective assistance of counsel articulated by this Court in *Strickland v. Washington*, 466 U.S. 668

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[3] Petitioner incorrectly characterizes the decision of the Michigan Court of Appeals as a summary disposition, Pet. 8, attempting to impute to the state court's decision the "fair trial" rationale it now advances. Summary dispositions of the sort at issue in *Harrington v. Richter*, No. 09-587, are typically a single conclusory sentence: "Petition for writ of habeas corpus is DENIED." *See* Petition for Writ of Certiorari at 22a, *Harrington v. Richter*, No 09-587 (Nov. 9, 2009). In contrast, the decision of the Michigan Court of Appeals, although brief, provided an explicit statement of that court's rationale that respondent had made the decision to plead guilty. *See* Pet. App. 45a.

(1984), instead substituting a rule of its own making that as long as the defendant makes the ultimate choice, the quality of his lawyer's advice and its influence on that choice do not matter. In *Strickland*, this Court adopted a two-part test for determining whether the Sixth Amendment right to effective assistance of counsel has been violated: the defendant must demonstrate first that counsel's performance fell below an objective standard of reasonableness, and second that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687. It was "past question" at the time of the state court trial in this case that the two-prong *Strickland* rule was clearly established federal law. *Williams*, 529 U.S. at 391; *see id.* at 413 ("*Strickland* undoubtedly qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States,' within the meaning of § 2254(d)(1)." (citation omitted)).

It was equally well-settled while this case was in the Michigan courts that "[t]he same two-part standard . . . [is] applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). This Court has "*long recognized* that the negotiation of a plea bargain . . . [implicates] the Sixth Amendment right to effective assistance of counsel," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added), including when the defendant makes the plea decision himself on the basis of counsel's advice, *Hill*, 474 U.S. at 59. An attorney's performance is

constitutionally deficient when he offers plea advice on the basis of an objectively incorrect understanding of straightforward law. *Padilla*, 130 S. Ct. at 1483-84; *see also id.* at 1492 (Alito, J., concurring) ("[A]ffirmative misadvice [during the plea bargaining process] may constitute ineffective assistance."). The defendant is prejudiced, and a Sixth Amendment violation established, when "counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Hill*, 474 U.S. at 59 (emphasis added).

This Court's decision in *Hill v. Lockhart* clearly establishes that an attorney's erroneous advice in the plea bargaining context may amount to constitutionally ineffective assistance of counsel, notwithstanding that the defendant makes his own choice on the basis of that advice about whether to go to trial. 474 U.S. at 57. The Court has long recognized that a plea decision "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Accordingly, the relevant question is not whether the defendant himself made a decision to accept or reject a plea, but instead "whether the plea represents a voluntary and intelligent choice among the alternative courses of action." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Where, as here, a defendant makes his plea decision on the basis of counsel's legally erroneous advice, and is subject to a higher sentence as a result, he is entitled to relief because "the voluntariness of the plea depends on whether counsel's

advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Indeed, this Court reaffirmed *Hill* as recently as last Term in *Padilla v. Kentucky*, holding that erroneous advice to accept a plea bargain – there, the advice that the agreement would not create adverse immigration consequences – can give rise to a Sixth Amendment violation. *Padilla*, 130 S. Ct. at 1483-84. Petitioner inexplicably fails to acknowledge the standard announced in *Hill* or to even cite this Court's decision in *Padilla*, on which the Sixth Circuit twice relied. *See* Pet. App. 12a, 14a.

2. There also is no merit to petitioner's passing contention that "[b]ecause this Court has not clearly established the appropriate *remedy*, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed." *See* Pet. 16 (emphasis added). Petitioner conflates the Sixth Amendment right with the remedy for its violation. Those are two separate issues.

The presence of clearly established law is pertinent only to a federal court's determination of *whether* to grant habeas relief, not to the *form* that relief takes. As the Sixth Circuit explained, "[t]he absence of clearly established law by the Supreme Court is not relevant when fashioning a habeas remedy." Pet. App. 20a. *Compare* 28 U.S.C. § 2254(d) (limiting federal courts' authority to grant a writ of habeas corpus to cases in which a

state court's decision runs against "clearly established Federal law"), *with* 28 U.S.C. § 2243 (providing that a federal court ordering a writ of habeas corpus "shall . . . dispose of the matter as law and justice require").[4] Petitioner's argument improperly conflates the clearly established law of *Strickland* with the remedy for that constitutional violation.

The wholly separate question of what *form* of remedy is appropriate when an attorney provides erroneous advice not to accept a plea bargain is not encompassed by the Question Presented. *See* Pet. i ("Is a state habeas petitioner *entitled to relief* where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?" (emphasis added)). Petitioner unsuccessfully raised the question of the remedy before the court of appeals, which noted that petitioner failed to "identify an alternative remedy that it would prefer, apparently content to leave the constitutional violation unremedied." Pet. App. 22a. The State then chose not to include the issue within the Question Presented.

The distinction between right and remedy also explains why there is no merit to petitioner's passing invocation, Pet. 10, of *Arave v. Hoffman*, 552

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[4] Nor is there any error in the Sixth Circuit's conclusion that the district court acted within its discretion in fashioning a remedy on these facts. Federal statutes and this Court's cases entrust lower courts with broad discretion in fashioning habeas remedies. 28 U.S.C. § 2243; *see Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (interpreting § 2243 "as vesting a federal court with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus" (quotation marks omitted)); *United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.").

U.S. 1008 (2007), *cert. dismissed*, 552 U.S. 117 (2008).[5] In *Arave*, the state's petition presented the question whether counsel's incorrect advice in plea negotiations must constitute "gross error" to establish constitutionally deficient performance. Petition for Writ of Certiorari at i, *Arave v. Hoffman*, No 07-110 (July 26, 2007). In other words, the State asked this Court to impose a higher standard for finding that counsel's performance was ineffective. This case does not present that issue. To be sure, in *Arave*, this Court also directed the parties to address the further question, "[w]hat, if any, *remedy* should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" 552 U.S. at 1008 (emphasis added). In this case, once again, that issue is not presented because petitioner no longer contests the remedy adopted by the district court. Because this case (unlike *Arave*) involves neither the question whether counsel's performance was deficient, which petitioner concedes, nor the question of the appropriate remedy when an attorney provides constitutionally inadequate advice to reject a plea agreement, certiorari should be denied.

II. An Attorney's Legally Erroneous Advice To Reject A Plea Offer Can Constitute Ineffective Assistance Of Counsel.

Petitioner misapprehends the scope of the Sixth Amendment in arguing that an attorney never provides constitutionally ineffective

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[5] After the Court granted certiorari, Hoffman filed a motion to vacate the Ninth Circuit's decision and dismiss the case because he had accepted a new plea offer that rendered his *Strickland* claim moot. This Court, in a per curiam opinion, granted Hoffman's motion and remanded the case to the Ninth Circuit. *Arave v. Hoffman*, 552 U.S. 117 (2008).

assistance of counsel by giving erroneous legal advice that leads his client to reject a favorable plea agreement, so long as the defendant is later convicted at a fair trial. The federal courts of appeals uniformly reject that view. There is accordingly no basis for this Court's intervention.

A. The Constitutional Violation That Arises From The Erroneous Advice Provided By Respondent's Lawyer Is Not Vitiated By The Subsequent Trial.

As discussed in Section I, *supra*, this Court has clearly established that a criminal defendant has a constitutional right to the effective assistance of counsel in determining whether to accept a plea bargain. According to petitioner, that right applies only when the attorney advises his client to accept a plea bargain, as in *Hill v. Lockhart*, 474 U.S. 52 (1985). By contrast, the lawyer's advice to turn down the plea, as in this case, would have no constitutional significance whatsoever.[6]

Petitioner's argument provides no basis for this asymmetry. *Hill* held, and later cases such as *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), confirm, that the right to counsel attaches at the plea bargain stage. *Hill* furthermore settles that the test for whether the defendant has been prejudiced is whether "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. There is no precedent for petitioner's position that the Constitution applies to the plea negotiation if

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[6] Although petitioner leaves open the prospect that the defendant could state a claim when the conviction did not result from a "fair trial," the constitutional violation in such a case would be unrelated to the attorney's advice at the plea stage.

the attorney advises the client to accept a plea offer, but does not apply if the lawyer advises the client to reject the identical offer. If the Sixth Amendment were concerned only with the right to a fair trial, it is unclear why it would apply at all when a defendant *accepts* a plea based on legally erroneous advice.

Indeed, this Court's decisions have laid down a categorical rule that plea bargaining is a critical stage of the criminal process, *Santobello v. New York*, 404 U.S. 257, 260 (1971), to which the Sixth Amendment right to counsel attaches. *United States v. Wade*, 388 U.S. 218, 224 (1967). The pretrial decision about whether to plead guilty is perhaps the most consequential choice a defendant makes in a criminal prosecution. "[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). Thus the Sixth Amendment right to effective assistance of counsel necessarily applies to the plea process, which is among "perhaps the most critical period[s] of the proceedings," regardless of whether counsel's ineffective performance leads the defendant to accept or instead reject a plea. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

Petitioner nevertheless argues that the prejudice requirements in this Court's Sixth Amendment jurisprudence "limit relief to circumstances where

counsel's deficient performance affected the fairness or existence of a trial." Pet. 3. That argument lacks merit. In *United States v. Gonzalez-Lopez*, this Court explained, "[i]t is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." 548 U.S. 140, 145 (2005). Because effective assistance of counsel cannot be meaningful unless it is extends beyond the narrow limits of the formal trial, *United States v. Ash*, 413 U.S. 300, 309-10 (1973), the right to effective assistance of counsel at pretrial proceedings cannot be discarded simply because a subsequent trial does not itself give rise to a further, independent violation of the defendant's constitutional rights.

Contrary to petitioner's submission, its position is not supported by this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *See* Pet. 12. In *Fretwell*, this Court determined that an attorney's failure to invoke a lower court ruling that was overturned soon thereafter did not give rise to a claim of ineffective assistance of counsel. *Id.* at 366. Reasoning that counsel's failure had only "deprived [Fretwell] of the chance to have the state court make an error in his favor," the Court found that counsel's performance had not prejudiced the defense. *Id.* at 371 (internal citation omitted).

Petitioner overreads this Court's observation in *Fretwell* that "mere outcome determination," 506 U.S. at 369, does not necessarily establish constitutional prejudice. In stark contrast to *Fretwell*, respondent does not

seek to take advantage of an error in the criminal justice system, and the State does not claim that its offer was a mistake or somehow illegal or illegitimate. Instead, respondent here would have been better off with no counsel at all during the plea bargaining process than he was with the dramatically ineffective counsel he received, because he would have pled guilty as he had always planned. Accordingly, he merely seeks to avoid the disadvantage his counsel caused him.

This Court rejected a similar attempt to extend the reasoning of *Fretwell* in *Williams v. Taylor*, 529 U.S. 362 (2000). The Court explained in *Williams* that although the facts of *Fretwell* "justifl[ied] a departure from a straightforward application of *Strickland*" to prevent a windfall to the defendant, this departure was unwarranted in the ordinary instance in which the defendant had been deprived of a substantive or procedural right – here, a right to competent advice from his counsel during plea negotiations. 529 U.S. at 393. Accordingly, any "separate inquiry into fundamental fairness" would contravene clearly established Federal law, given that respondent "is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding," *id.* at 393. State law created a plea bargain process that functioned properly, with the sole exception that respondent's counsel provided grossly inadequate advice that caused him to turn down a favorable plea bargain.

B. The Circuits Uniformly Agree That Legally Erroneous Advice From Counsel To Reject A Favorable Plea Offer May Constitute A Violation Of The Sixth Amendment, Regardless Of Whether The Subsequent Trial Is "Fair."

Consistent with this Court's precedents, every circuit has recognized a Sixth Amendment claim when ineffective assistance of counsel leads a defendant to reject a plea offer, even if he is later convicted following a fair trial. *See, e.g.*, *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) (per curiam) (counsel's bad advice leading to rejection of plea offer "does not preclude an attack on Sixth Amendment grounds" even if defendant "still receives all the constitutional protections of trial"); *United States v. Gordon*, 156 F.3d 376, 380-81 (2d Cir. 1998) (per curiam) (counsel's grossly incorrect advice leading to rejection of a plea "satisfied the two prongs of *Strickland*"); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("subsequent fair trial does not remedy" earlier lack of effective counsel that led to rejection of favorable plea offer); *United States v. Brannon*, 48 Fed. Appx. 51, 53 (4th Cir. 2002) (per curiam) ("[e]rroneous advice during the plea negotiation process" constitutes Sixth Amendment violation); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981); *Turner v. Tennessee*, 940 F.2d 1000, 1001 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007); *Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001) (determining that it was "an objectively unreasonable application of *Strickland*'s prejudice prong" for the state court to "h[o]ld that [defendant] could not show that he had been prejudiced by any

inadequate advice at the plea bargaining stage because he ultimately received a fair trial"); *Hoffman v. Arave*, 455 F.3d 926, 942 (9th Cir. 2006), *cert. dismissed*, 552 U.S. 117 (2008) (finding prejudice where counsel's erroneous advice led to rejection of a plea and conviction after a fair trial); *Williams v. Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) (per curiam), *cert. denied*, 130 S.Ct. 3385 (2010) (same); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996); *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (per curiam) (Tatel, J.).[7]

Petitioner cites a single case as arguably suggesting that a defendant suffers no prejudice from the erroneous advice to reject a favorable plea bargain. *See* Pet. 17 (citing *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993)). In fact, the Seventh Circuit applies the same rule as every other court of appeals. In *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007), for instance, the defendant rejected a favorable plea offer on the basis of his counsel's legally erroneous advice regarding the maximum sentence allowable for his offense. Following a fair trial, the jury handed down a much

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[7] Many state courts have similarly found violations of criminal defendants' Sixth Amendment rights where counsel's deficient performance leads to the rejection of a favorable plea. *See, e.g., In re McCready*, 996 P.2d 658 (Wash. Ct. App. 2000) (finding Sixth Amendment violation where counsel's misinformation caused defendant to reject a plea); *State v. Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997) (same); *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997) ("[I]t has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial."); *Williams v. State*, 605 A.2d 103 (Md. 1992) (same); *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) (en banc) ("[W]e conclude, in conformity with the decisions of the federal and state courts that have addressed the issue, that when a defendant" rejects a plea bargain due to ineffective assistance of counsel, "the defendant has been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment . . . even if defendant thereafter receives a fair trial.").

harsher sentence. Faced with convincing evidence that the defendant would have accepted the plea offer but for his attorney's unreasonably flawed advice and gross underestimation of the risk of going to trial, the Seventh Circuit found that Julian had satisfied both *Strickland* prongs and established a valid Sixth Amendment claim. *Id.* at 498. *See also Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991) (applying *Strickland* test where ineffective assistance of counsel led to rejection of plea offer), *cert. denied*, 505 U.S. 1223 (1992); *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998) (following *Toro*).

The Seventh Circuit's decision in *Springs*, by contrast, is inapposite. The court in that case merely held that a defendant cannot prove prejudice simply on the basis of having accepted a suboptimal plea deal following his attorney's failure to "loc[k] in" a better one, the terms of which the defendant refused to accept. 988 F.2d at 749. That narrow factual circumstance finds no parallel in the facts of this case. Respondent is not challenging his attorney's failure to force him to take a plea deal, but rather his attorney's legally erroneous advice to reject it.[8]

III. This Case Is A Poor Vehicle To Address The Issues Raised By Petitioner.

Even if certiorari were otherwise warranted to decide the questions presented, for a number of reasons this case would be a poor vehicle in which

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[8] Furthermore, the opinion in *Springs* relies on the same language from *Fretwell* invoked by petitioner and discussed above. 988 F.2d at 749. But subsequent to *Springs*, this Court rejected that expansive interpretation of *Fretwell*. *Williams v. Taylor*, 529 U.S. 362, 393 (2000).

to do so. First, this case is not well suited to exploring the degree of deference afforded to state court rulings under AEDPA. Petitioner does not defend – indeed, does not even *acknowledge* – the actual basis for the state courts' ruling. That decision was so obviously contrary to this Court's clearly established precedents that "[e]ven full deference under AEDPA cannot salvage the state court's decision." Pet. App. 11a. This Court should instead address the application of AEDPA to an attorney's erroneous advice to reject a plea bargain in a case in which the state court actually adopts the legal rule now proposed by the State's lawyers: that such a factual scenario cannot give rise to a claim under the Sixth Amendment so long as the defendant receives a fair trial.

Indeed, to reach the issue raised by petitioner, this Court could be forced to wade through murky interpretive questions regarding the state court decisions in applying AEDPA. The decision of the Michigan Court of Appeals was explicit, but extremely terse. For example, the Sixth Circuit explained that "it is highly unlikely that anything in either cursory ruling of the [state] trial court or the [state] appellate court could be construed as addressing the prejudice prong of petitioner's ineffective assistance claim." Pet. App. 19a n.4.

Second, this Court would be better served to address the Sixth Amendment question raised by the petition without the complication created by deciding the issue in a state case on federal habeas corpus. The fact that

the Sixth Circuit's application of AEDPA is also contested, *see* Section I, only further complicates review of the Sixth Amendment issue. Because of these complications, the proper vehicle to resolve the Sixth Amendment's application in this context would be a state case on direct review, as in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), last Term, or a federal criminal case.

Third, this Court recently resolved analogous Sixth Amendment issues in decisions that the lower courts have not yet had time to consider fully. Most important, this Court very recently held that an attorney's advice in plea negotiations is subject to the Sixth Amendment in *Padilla v. Kentucky*. The implications of this ruling should be permitted to percolate further before this Court intervenes to decide yet another case regarding the application of the Sixth Amendment to plea negotiations.

Fourth, the record in this case contains one material uncertainty. On the date of trial, the prosecution offered respondent a final plea bargain. That offer was declined. But the record does not explain the circumstances. This lack of clarity could complicate the Court's determination of whether respondent was prejudiced by counsel's unconstitutionally deficient advice.

Also, it would be unusual for this Court to address petitioner's "fair trial, so no prejudice" argument when the State did not make that argument in its answer to respondent's petition for habeas corpus. By failing to raise this argument in the first instance, the State waived it. The answer to the

habeas petition argued only that the performance of respondent's counsel was not deficient, and that respondent provided insufficient evidence that he would have pled guilty had his counsel properly advised him.

Finally, there remains some doubt as to whether respondent's trial was "fair and reliable" to begin with. Respondent argued during the state court proceedings that his trial counsel provided constitutionally ineffective representation during trial; this is unsurprising, given the established record of counsel's deficient performance leading up to the trial. Persisting in his mistaken belief that respondent could not be convicted on the AWIM charge, and that respondent would ultimately receive a better plea offer before the start of trial, counsel deemed it unnecessary to prepare a defense. *Ginther* Hr'g Tr. 38. This case thus presents an inappropriate vehicle for testing the proposition that a fair trial vitiates an earlier violation of the right to effective counsel: precisely because counsel's belief in the imminence of a better plea obviated the need to prepare for trial, the subsequent trial could not have been fair and could not have cured the Sixth Amendment violation during the earlier plea stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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REPLY BRIEF

RECORD
AND
BRIEFS

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No. 10-209

In The
Supreme Court of the United States

BLAINE LAFLER
Petitioner,

v.

ANTHONY COOPER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

In his brief in opposition, Respondent raises two basic arguments about why this Court should deny the petition for certiorari: (1) that this Court has provided clear guidance on this issue; and (2) that this case does not present a good vehicle in which to examine the question presented (whether a criminal defendant in habeas is entitled to relief under the Constitution for deficient advice on a plea offer where he is then convicted at a fair trial). Respondent is wrong on both points.

First, this Court has not provided an answer to the question presented here. The seminal cases in this area, *Strickland v. Washington*,[1] and *Hill v. Lockhart*,[2] are predicated on ensuring that the proceeding from which a criminal defendant was convicted was fair and reliable. Neither addresses the circumstance where deficient advice results in a conviction from a fair trial. Nor does *Padilla v. Kentucky*.[3] It is the State of Michigan's position that the Sixth Amendment right to counsel protects a defendant's right to a fair trial – there is no constitutional right to a plea bargain. A criminal defendant is not entitled to any relief where he has been convicted at a fair trial. This reasoning is consonant with this Court's analysis in *Mabry v. Johnson*,[4] and *Weatherford v. Bursey*,[5] two cases that

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Hill v. Lockhart*, 474 U.S. 52 (1985).

[3] *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

[4] *Mabry v. Johnson*, 467 U.S. 504 (1984), abrogated on other grounds by *Puckett v. United States*, 129 S.Ct. 1423 (2009).

[5] *Weatherford v. Bursey*, 429 U.S. 545 (1977).

Respondent fails to address – or even cite – in his brief in opposition.

Second, this petition provides a proper vehicle to address this question. The U.S. Court of Appeals for the Sixth Circuit expressly addressed and rejected the argument presented here, squarely raising the issue for this Court's review. Also, the fact that the issue arises from a habeas corpus proceeding does not undermine the ability of the Court to resolve the question. In fact, this Court invited the same basic question in a habeas case, *Arave v. Hoffman*.[6] And even if this Court determined that the State court determination here was not entitled to deference, the question presented would enable this Court to examine the issue de novo.

ARGUMENT

I. This Court has not previously resolved the issue whether a criminal defendant is entitled to relief where he is convicted at a fair trial but only after receiving deficient advice and rejecting a plea offer.

Respondent contends that this Court's prior precedent clearly resolves this question, in that Respondent was "prejudiced" under the Sixth Amendment because his counsel provided deficient advice causing him to reject the plea offer. Res. Br. 14-16, 19-22. This conclusion is not established by this Court's precedent.

A. The question presented is a new one for this Court.

This Court has not answered the question about what should result where a criminal defendant rejects a plea offer based on deficient advice and then is convicted at a fair trial. The issue is whether the criminal defendant was "prejudiced" by the failure to be able to avail himself of the plea offer. That is a novel question for this Court.

This conclusion is confirmed by the fact that this Court invited the following question in *Arave v. Hoffman* in 2007:

> In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "What, *if any*, remedy should be provided for ineffective assistance of counsel

> during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[7]

By including the phrase "if any," this question presumes that there might not be any remedy for the ineffective assistance counsel during plea negotiations where there is a subsequent fair trial.

The case law demonstrates that this is an open question. The general standard from *Strickland v. Washington* makes clear that the Sixth Amendment right to effective counsel is predicated on the protection of the "fundamental right to a fair trial."[8] The criminal defendant must prove both deficient performance and prejudice.[9] The focus from *Strickland* is the guarantee that the adversarial process produce a "just result."[10] In specific, the prejudice prong of *Strickland* examines whether the reliability of the outcome of the proceeding has been undermined because of "a breakdown in the adversarial process[.]"[11]

There is no dispute that the *Strickland* standard applies to the representation of counsel during the negotiations for a plea bargain and that these negotiations represent a critical stage in the criminal process. The issue is not whether a criminal defendant is entitled to the effective representation of counsel during plea negotiation, but rather whether he is

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[7] *Arave*, 552 U.S. at 1008 (emphasis added).

[8] *Strickland*, 466 U.S. 684-85.

[9] *Strickland*, 466 U.S. at 687.

[10] *Strickland*, 466 U.S. at 685.

[11] *Strickland*, 466 U.S. at 696.

entitled to relief where he is convicted after a fair trial – a trial that only occurred because he was given deficient advice causing him not to take a plea offer.

This Court's prior decisions do not resolve this issue. In applying *Strickland* and evaluating the effective assistance of counsel for plea negotiations, this Court's decision in *Hill v. Lockhart* was predicated on the criminal defendant pleading guilty and waiving his right to trial.[12]

In *Hill*, this Court was examining whether the petitioner's plea was involuntary based on the ineffective assistance of counsel where his counsel misinformed him about his parole eligibility date.[13] The Court noted that the two-part *Strickland* test applies to guilty-plea cases and clarified that the defendant carried the burden of demonstrating that "there is a reasonable probability" that he would have otherwise gone to trial.[14]

Respondent isolates a specific sentence from *Hill* to suggest that *Hill* resolves the question here, but further context makes clear that *Hill* only answers the issue of prejudice where the criminal defendant has pled guilty:

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the

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[12] *Hill*, 474 U.S. at 52.

[13] *Hill*, 474 U.S. at 54-55.

[14] *Hill*, 474 U.S. at 59.

> plea process. *In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*[15]

Respondent contends that the first sentence from this block quote is dispositive to the question here, because the deficient advice in this case affected the outcome of the plea process, i.e., Respondent did not plead guilty. Res. Br. 15, 15, 19. This analysis from *Hill*, however, is further explained by the next sentence that the criminal defendant must prove that he would not have pled guilty but for the deficient advice. *Hill* does not answer the question whether a criminal defendant is entitled to relief where the deficient advice caused the criminal defendant *to refuse to plead guilty*.

This Court's analysis in *Padilla v. Kentucky* is likewise predicated on the fact the criminal defendant pled guilty rather than went to trial.[16] This Court noted that a defendant is entitled to the effective assistance of counsel before deciding whether to plead guilty, but did not address the circumstance that would occur where an attorney provided deficient advice on an immigration matter and the criminal defendant went to trial.[17]

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[15] *Hill*, 474 U.S. at 59 (emphasis added).

[16] *Padilla*, 130 S.Ct. at 1483-84. *See also McMann v. Richardson*, 397 U.S. 759, 771 (1970).

B. Respondent fails to address this Court's decisions in *Mabry* and *Weatherford*, which suggest that there should be no relief here.

Respondent's failure to recognize the importance of the distinction between pleading guilty and refusing the plea based on deficient advice is predicated on two errors.

First, Respondent suggests that there is no basis for the "asymmetry" of granting relief for deficient advice that results in a plea, but not for such advice that leads to trial. Res. Br. 19-20. But the distinction between these outcomes is rooted in the nature of a plea. A criminal defendant who pleads guilty waives his right to a trial and other important rights.[18] By contrast, a criminal defendant who is convicted at a fair trial and receives a just sentence has received the protection envisioned by this Court under *Strickland*.

Second, Respondent's claim is predicated ultimately on the idea that a criminal defendant has a constitutional right to take advantage of the prosecution's plea offer. But this Court has expressly rejected such a claim. As this Court stated in *Weatherford*, "there is no constitutional right to a plea bargain."[19] And therefore a plea bargain – standing alone – does not implicate the constitutionally-protected interests of the criminal defendant. This Court in *Mabry* explained this point:

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[18] *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

[19] *Weatherford*, 429 U.S. at 561.

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.[20]

Thus, the language from this Court in *Lockhart v. Fretwell* is applicable: "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[21] There was no such right implicated here.

The *Mabry* case bears this point out. In *Mabry*, the Court held that there was no cognizable constitutional injury under Due Process when the prosecution withdrew a plea offer that the criminal defendant had already accepted. The criminal defendant later pled guilty and received a harsher sentence.[22] This Court held that the criminal defendant's "inability to enforce the prosecutor's offer is without constitutional significance."[23] The key to the Court's analysis was that the criminal defendant's liberty was not taken away from him "in any fundamentally unfair way."[24]

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[20] *Mabry*, 467 U.S. at 507-508 (footnotes omitted).

[21] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[22] *Mabry*, 467 U.S. at 506.

[23] *Mabry*, 467 U.S. at 510.

[24] *Mabry*, 467 U.S. at 511.

The same is true here. Respondent's loss of liberty did not arise from his failure to plead guilty but from his trial-based conviction. There was nothing constitutionally infirm about his trial. The loss of his ability to plead guilty is the loss of a claim for which he has no entitlement in law. In the same way, the prosecution under *Mabry* could have reneged on the offer regardless whether the prosecution was "negligent or otherwise culpable" in withdrawing the offer.[25]

Respondent also suggests that because the federal circuits are generally unified on this issue that the question is not appropriate for certiorari. Res. Br. 23-25. But Respondent does not contest the point that several State courts have reached contrary results, which creates a conflict between the federal courts and some State courts under Supreme Court Rule 10. Pet. 14-15.[26]

C. The question presented raises the right issue.

Respondent also contends that the question presented here is distinct from the question that this Court requested be addressed in *Arave*. Specifically, Respondent asserts that the issue whether there is a "remedy" available for a violation of the Sixth Amendment is different from whether Respondent is entitled to relief. Res. Br. 16-18. These questions raise the same issue in this factual setting – what results

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[25] *Mabry*, 467 U.S. at 511.

[26] *See State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000).

from a claim of a Sixth Amendment violation where the criminal defendant has received a fair trial.

The paramount issue is whether the criminal defendant has received the protection that the Sixth Amendment right to counsel is intended to safeguard – a fair trial. In this circumstance, the issue about whether there is a remedy for ineffective assistance of counsel raises the same issue as whether there is any constitutional prejudice for the inaccurate legal advice. The question in each is whether the intervening event of the fair trial extinguishes any claim of error.

The State of Michigan argues here that there is no prejudice under *Strickland* for deficient performance because there is no constitutional right to a plea bargain. The factual prejudice of missing out on a plea bargain is not a cognizable harm under the Sixth Amendment, because the right to counsel under the Sixth Amendment is based on the right to secure a fair trial.

This reasoning is consistent with the analysis from the Utah Supreme Court on the question in *State v. Greuber* in which it rejected the claim of ineffective assistance of counsel (failure to investigate evidence that may have supported a plea) under the Sixth Amendment where the defendant was convicted at a fair trial.

> Thus, while Greuber did possess the right to effective assistance of counsel during the plea process, he could not ultimately have been prejudiced in this case because he received a trial that was fair – the

> fundamental right that the Sixth Amendment is designed to protect. Nothing in counsels' pretrial conduct suggests "that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.[27]

This analysis equally applies here.[28]

II. There are no vehicle problems with this petition for certiorari.

Respondent argues that there are vehicle problems that recommend that this Court not grant the writ of certiorari. Res. Br. 10, 25-28. The State shall address these claims individually.

A. The Sixth Circuit specifically addressed the question presented and rejected the claim that the State of Michigan is advancing here.

Respondent contends that because this claim was not advanced in the district court that it somehow hinders the ability of this Court to review the claim here. Res. Br. 10, 27-28. This is wrong.

The Sixth Circuit squarely addressed the argument raised here. The Sixth Circuit noted that the State raised the argument – "[the State] nevertheless contends that there is no prejudice because petitioner

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[27] *Greuber*, 165 P.3d at 1189.

[28] The Utah Supreme Court declined to address the circumstance in which – as here – the defense counsel provided affirmatively erroneous advice. *Greuber*, 165 P.3d at 1189 n. 4.

received a fair trial, which is all that the Sixth Amendment is meant to preserve." Pet. App. 18a.

The Sixth Circuit then rejected this claim, addressing it directly:

> To say that there is no prejudice because the petitioner ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants.
>
> * * *
>
> [Respondent] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel. Thus, he has established prejudice. [Pet. App. 18a-19a (footnote omitted).]

The issue, therefore, is properly framed for the Court.

B. The fact that this question arises from a habeas case does not present a vehicle problem.

Respondent also contends that this petition is a poor vehicle because the case arises in a habeas context under the Antiterrorism and Effective Death Penalty Act (AEDPA), Res. Br. 10, 25-27, and because the State court did not provide the "fair trial" explanation as the basis of denying Respondent relief on appeal. Res. Br. 10, 13-14.

The fact that the issue is presented in habeas corpus review does not create any impediment for this Court's ability to respond to the question presented. In fact, one of the cases on which Respondent relies most heavily in support of his position, *Hill v. Lockhart*,[29] *see* Res. Br. 14, 15, 19, was a habeas case. Also, the case in which this Court invited briefing on the same basic claim was also a habeas case, *Arave v. Hoffman*.[30]

Likewise, the fact that the State court did not explain that it was relying on the "fair trial" justification in denying Respondent relief is not a vehicle problem. This Court may accept the State's argument that the summary decision is entitled to deference under AEDPA, *see* Pet. 8-9,[31] or determine that the decision should be subject to de novo review.[32] In either event, the question presented is broad enough to fairly include the analysis for either conclusion under Supreme Court Rule 14.1(a).[33]

C. There are no factual questions at issue that undermine the question presented.

Finally, Respondent asserts that there are outstanding questions about whether Respondent was convicted at a fair trial. Res. Br. 28. There has been no

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[29] *Hill*, 474 U.S. at 55.

[30] *Arave*, 552 U.S. at 1008.

[31] *See Harrington v. Richter*, 130 S.Ct. 1506 (2010)(granting certiorari on the issue whether a summary order is entitled to AEDPA deference), argued on October 12, 2010.

[32] *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

[33] *See Berghuis v. Smith*, 130 S.Ct. 1382, 1392 n. 3 (2010).

claim challenging the fairness of the trial in federal court.

The only issue raised in the petition filed in federal district court on March 13, 2006, p. 9, was the following:

> I. Trial counsel rendered incompetent advice during the plea bargaining process which denied Mr. Cooper the effective assistance of counsel.

Respondent also did not contest the fairness of his trial-based conviction in the Sixth Circuit. *See* Respondent's appellee's brief, filed July 8, 2009, p. 26.

Consequently, the question presented here directly frames the issue and there are no unresolved factual controversies.[34]

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[34] Respondent also suggests that the record does not indicate why the final plea offer tendered on the trial date was rejected could "complicate" the issue. Res. Br. 27. This claim is without merit. The State is no longer contesting the factual point that Respondent's counsel provided deficient advice when the first plea offer was made to him.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The

Supreme Court Of The United States

BLAINE LAFLER,
Petitioner,

v.

ANTHONY COOPER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CONNECTICUT AND SIXTEEN OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

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INTERESTS OF THE AMICI CURIAE

The State of Connecticut, and the sixteen other states that join in this brief, have a compelling interest in defending the presumptively valid judgments of their courts against post-conviction claims in federal court. Accordingly, the *amici* states have an equally compelling interest in ensuring that the lower federal courts properly apply the standard of review for federal habeas corpus claims prescribed by Congress in the Antiterrorism and Effective Death Penalty Act of 1996. In addition, because the *amici* states must defend presumptively valid judgments against post-conviction claims of ineffective assistance of counsel in state and federal courts, they have a strong interest in ensuring that the law governing such claims is properly applied. The *amici* states, therefore, have a substantial interest in this Court's determination of whether to review the Sixth Circuit's decision.[1]

---

[1] Article XXIII of the Amendments to the Constitution of the State of Connecticut established "within the executive department a division of criminal justice which shall be in charge of ... prosecution of all criminal matters" and designated the Chief State's Attorney as the head of the division. Connecticut General Statutes § 51-278(c) provides that the Chief State's Attorney is responsible for "all appellate . . . and postconviction proceedings arising out of . . . any criminal action whether . . . denominated civil or criminal for other purposes." Thus, under Connecticut law, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. Therefore, Supreme Court Rule 37.4 permits the Chief State's Attorney of Connecticut, as well as the Attorneys General for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae's* intention to file this brief.

STATEMENT[2]

The Respondent, Anthony Cooper, was charged in the district court in Wayne County, Michigan, with Assault with Intent to Murder, Possession of a Firearm by a Felon, Possession of a Firearm in the Commission of a Felony, misdemeanor Possession of Marijuana, and a habitual offender enhancement. These charges stemmed from a March 25, 2003 incident, in which the Respondent gunned down Kali Mundy, causing her life-threatening injuries. Following a preliminary hearing, the prosecutor extended a plea offer involving a sentence of fifty-one to eighty-five months imprisonment, in exchange for a plea of guilty to Assault with Intent to Murder. The Respondent's attorney counseled against the plea. Based upon an erroneous conception of Michigan law, the attorney believed the medical evidence of Mundy's injuries was insufficient to support the charge of Assault with Intent to Murder.

At a July 17, 2003, pretrial conference, a written plea agreement consistent with the earlier offer was provided to the Respondent. The attorney expressed his belief that the offer was not reasonable and that the evidence was insufficient. The prosecutor then withdrew the offer, after which the attorney stated "we're just rejecting it." A trial followed, at the conclusion of which the Respondent was found guilty of

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[2] The facts summarized in the Statement section are drawn from the Sixth Circuit's unpublished decision in *Cooper v. Lafler*, No. 09-1487, slip op. (6th Cir. May 11, 2010), Pet. App. 1a - 22a.

all charged crimes. He was sentenced to 185 to 360 months incarceration.

Subsequently, the petitioner claimed in a post-conviction proceeding that his attorney rendered ineffective assistance of counsel with respect to the plea offer. The trial court denied the petitioner's claim, and the Michigan Court of Appeals affirmed. The Michigan Supreme Court denied leave to appeal. Thereafter, the Respondent filed a petition in the United States District Court seeking relief under 28 U.S.C. § 2254. The District Court held that the Michigan court unreasonably applied this Court's precedents, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52 (1985), in determining that the Respondent did not prove his ineffective assistance claim. The District Court, therefore, ordered Michigan to revive the plea offer of fifty-one to eighty-five months incarceration, so that the Respondent could accept it, or release him.

The Sixth Circuit Court of Appeals affirmed the District Court's determination that Michigan unreasonably applied *Strickland* and *Hill*, and affirmed the "specific performance" remedy. The Sixth Circuit set forth the standards announced under these two cases. In order to prove ineffective assistance of counsel, the Respondent had to show that his attorney's performance was deficient, and that he was prejudiced thereby. The Sixth Circuit reasoned that the Respondent's attorney affirmatively misadvised him regarding the evidence necessary to support a charge of Assault with Intent to Murder. Accordingly, the attorney performed deficiently. With respect to the prejudice requirement,

the Sixth Circuit reasoned that the petitioner would have accepted the prosecutor's offer if he had been properly advised. Noting this Court's recognition of "the importance of counsel during plea negotiations," the Sixth Circuit concluded that the Respondent was denied the right to counsel during a "critical stage" of the proceedings, and, as a result, was prejudiced by the lost opportunity to plead guilty and receive the shorter sentence.

REASONS FOR GRANTING THE PETITION

This case presents the important question of whether the Sixth Amendment's guarantee of counsel's assistance is implicated when a criminal defendant rejects a plea offer due to his attorney's mistake and is then convicted following a constitutionally sound trial. Michigan courts found that the Respondent had not proved his ineffective assistance of counsel claim under this scenario. Notwithstanding the Sixth Circuit's determination that Michigan courts "unreasonably applied" clearly established federal law, this Court has not established that the plea-rejection-followed-by-fair-trial scenario is amenable to a Sixth Amendment challenge. The Court has, however, touched upon the plea rejection situation in the context of a treaty violation claim.

In *Breard v. Greene*, 523 U.S. 371 (1998)(per curiam), a foreign national rejected a plea offer that would have spared his life, and he was sentenced to death following a trial. He claimed that the Vienna Convention on Consular Relations was violated because he was not given the right, upon arrest, to contact his

nation's Consulate, upon whose advice he would have accepted the offer. This Court held that the claim was procedurally defaulted, but nonetheless opined:

> Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.

Breard, 523 U.S. at 377. For the reasons that follow, the *amici* respectfully urge that the same principle should have guided the resolution of the Sixth Amendment controversy in this case. Because the plea rejection did not affect the trial, the final judgment of conviction and the attendant sentence should remain intact.

The Sixth Circuit in this case has held – and many, if not all, of the other Circuits in comparable cases have held – that a Sixth Amendment violation can be established regardless of whether a defendant ultimately received a fair trial. Far from promoting the stability that this type of uniformity may typically engender, a review of the various opinions discloses a struggle to outfit the *Strickland-Hill* paradigm to the plea rejection scenario, for which it is not engineered. This has resulted in a variety of clumsy endeavors to provide a remedy where one is neither deserved nor warranted. The remedy afforded here is one example. In Michigan, a trial judge may decide whether to accept or reject a plea bargain struck by the parties. Michigan

Rules of Court § 6302(c)(3). Yet, the defense attorney has done through error what the prosecutor does not have the power to do by design – he has committed the trial court to accept the plea. The Sixth Circuit's decision in this case, awarding "specific performance" based on a defense counsel error, ignores and effectively eliminates the trial court's discretionary authority to accept *or reject* a proposed plea agreement.

Moreover, the type of "specific performance" remedy afforded here creates even further tension where state constitutions and laws grant victims the right to be heard and have their input considered with respect to plea acceptance.[3] In those cases, to the extent a victim opposes the plea agreement, his or her voice is stolen by the defense attorney's error. None of this strain is necessary. As this Court has explained, absent an impact of counsel error on the whole of the criminal proceeding, "there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *United States v. Morrison*, 449 U.S. 361, 365 (1981). The near-universal breach of this Court's precedents in an effort to fix what is not broken begs for this Court's review at this time.

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[3] *See, e.g.*, CONN. CONST. Art. 1, § 8 (granting victims "[t]he right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to acceptance by the court of the plea of guilty or nolo contendere by the accused").

In this case, the Sixth Circuit, invoking the *Strickland-Hill* standard for determining ineffective assistance of counsel, reasoned that the Respondent was denied the right to be represented by counsel during the "critical stage" of plea negotiations, and was thus prejudiced by a longer sentence imposed following a fair trial. In other words, the Sixth Circuit determined that the Respondent is entitled to *relief from a fair trial.* This holding is representative of a fundamental misapplication in the circuits of this Court's Sixth Amendment jurisprudence. The holding elevates the plea process to a level of importance greater than the trial itself, and ignores the principle that, once secured, a fair trial annuls any claim that the Sixth Amendment guarantee has been withheld.

As a result of the Sixth Circuit's deflection from the target of the Sixth Amendment guarantee, it erred in applying this Court's precedents with respect to the predicate determinations that necessarily underlie a finding that there has been a Sixth Amendment violation. First, the court erred in determining that plea rejection amounts to a "critical stage" at which counsel's assistance is guaranteed. Second, even if the Sixth Amendment guarantee were implicated, the court incorrectly applied the *Strickland-Hill* prejudice component. Specifically, the court ignored the requirement that prejudice be established by showing that counsel's error caused either: (1) The loss of a substantive or procedural entitlement, but for which the outcome would have been different; or, (2) In the absence of lost entitlement, an outcome that is nonetheless fundamentally unfair or unreliable.

A. The Sixth Circuit Erred in Determining that Plea Rejection Gives Rise to a "Critical Stage" Implicating the Guarantee of Counsel's Assistance

The Sixth Circuit concluded that the Respondent was deprived of the assistance of counsel during a "critical stage" of the proceedings. Pet. App. at 18a. The Sixth Circuit based this conclusion on this Court's recognition of the importance of counsel during plea negotiations. *Id.* However, when this Court has spoken of counsel's importance to plea bargaining, it has done so in recognition of the efficient role that *pleas of guilty* play in the reliable disposition of criminal charges in the multitude of cases on the dockets of the country's courts. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742 (1970). Disposition by plea is desirable, in part, because it promotes promptness and finality in criminal cases, avoids idle pre-trial confinement, protects the public from recidivist criminals, lends expediency, and enhances rehabilitative prospects. *Santobello*, 404 U.S. at 261.

These benefits of plea negotiation are not appropriate considerations here. Restoring the respondent's ability to accept the plea offer after his guilt has been fairly determined at a trial on the merits does nothing to advance these goals. Instead, it unfastens a reliable and fairly obtained conviction previously thought to be final. Moreover, the proceedings have been no more prompt, rehabilitative prospects no more enhanced, and pre-trial confinement no less idle, than had there been no offer in the first instance. Finally,

rather than affording the public protection from recidivism, the criminal will be released earlier than the time deemed warranted upon a full vetting, at trial and sentencing, of his conduct.

More importantly, although this Court has encouraged plea negotiations in view of its benefits to the efficient administration of criminal justice, these extra-constitutional considerations have not informed the Court's determination of whether an event constitutes a "critical stage" at which counsel's assistance is constitutionally mandated. Rather, this Court has consistently looked to the historical purpose of the counsel clause in determining whether an event constitutes a "critical stage." *United States v. Ash*, 413 U.S. 300, 311 (1973).

This Court has stated time and again that the counsel clause was conceived for the express purpose of ensuring that a defendant receive a fair decision on the merits of his defense at trial. *Strickland*, 466 U.S. at 684-85; *Evitts v. Lucey*, 469 U.S. 387, 395 (1985); *United States v. Cronic*, 466 U.S. 648, 658 (1984); *see also*, *Powell v. Alabama*, 287 U.S. 45, 70 (1932). Although the core purpose of the guarantee is to assure assistance at trial, this Court has recognized that some pre-trial events are themselves "trial-like" confrontations at which counsel's absence may impair a defendant's ability to ultimately receive a fair trial on the merits. *Ash*, 413 U.S. at 309-10; *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). Therefore, this Court has expanded the guarantee of counsel to these "critical stages." *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

Notwithstanding that the Sixth Amendment guarantee has been expanded beyond counsel's role at trial, this Court has narrowly circumscribed these critical stages at which counsel's assistance is guaranteed. As the Court has explained, the guarantee has been expanded "only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Ash*, 413 U.S. at 311. The results of these pretrial confrontations "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967). Simply put, a pretrial event does not constitute a "critical stage," at which counsel's assistance is guaranteed, if the risks that it will derogate from the trial right are minimal. *Wade*, 388 U.S. at 227-28; *Gilbert v. California*, 388 U.S. 263, 267 (1967).

The rejection of a plea offer has no potential to corrupt the right to a fair trial. Nor did this Respondent's rejection of the plea offer "settle his fate." To the contrary, it left his fate to be determined by the ensuing trial – the only opportunity he had to be found not guilty. Hence, the Sixth Circuit erred in concluding that this Respondent was deprived of his right to counsel at a "critical stage."

To be sure, this Court has recognized that plea negotiations are a "critical stage" when they result in the *acceptance* of a plea, and the forfeiture of the trial right. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486, (2010); *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). But the plea bargain alone does not implicate the Constitution; "it is the ensuing guilty plea that implicates the Constitution." *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984), *dictum*

on another point of law disavowed, *Puckett v. United States*, 129 S.Ct. 1423, 1430 n.1 (2009). Any notion that plea *rejection* must constitute a "critical stage" because plea *acceptance* is a "critical stage" erroneously puts the focus on the bargain, rather than its resulting effect on the trial, and overlooks this Court's precedent that a critical stage is a confrontation that has the potential to affect the trial.

Focusing on the purpose and intent of the counsel clause, this Court, in *Hamilton v. Alabama*, 368 U.S. 52 (1961), and *Coleman v. Alabama*, 399 U.S. 1 (1970), held that an arraignment in Alabama is a "critical stage" mandating counsel's assistance, even though it may not be one in other states. This is so because Alabama's arraignment procedures give rise to a potential for trial consequences. In contrast, the probable cause hearing in *Gerstein* did not pose a risk to the trial, and counsel's absence, therefore, did not violate the Constitution. Similarly, while the pretrial identification procedures employed in *Wade* amounted to a critical stage because of potential prejudice that "may not be capable of reconstruction at trial," those employed in *Ash* bore no risk to the integrity of the trial, and therefore were not a "critical stage."

Even where a pretrial "confrontation" has the potential for trial consequences, this Court has said that efforts to eliminate the risks "may also remove the basis for regarding the stage as 'critical'." *Wade*, 388 U.S. at 239. Indeed, "the opportunity to cure defects at trial causes the confrontation to cease to be critical." *Ash*, 413 U.S. at 316. Although the Sixth Circuit here rejected the argument that a fair trial ameliorates any harm of

attorney error at the earlier plea rejection stage, it is precisely the fairness of the trial that cured any defect in the earlier confrontation, and caused plea negotiations to cease to be a critical stage.

This Court has previously recognized that a "drastic expansion of the right to counsel," and a "substantial departure" from the Sixth Amendment's historical application, would result if the proper test for criticality were to be ignored. *Ash*, 413 U.S. at 316-17. This is exactly what has happened here. In failing to apply the proper "critical stage" analysis, the Sixth Circuit has expanded the right to counsel to a context that does not present the same risks "that gave birth initially to the right itself." Thus, the Sixth Circuit contravened this Court's precedents in finding that this Respondent was deprived of the counsel guarantee at a "critical stage."

B. Even if the Guarantee of Counsel's Assistance is Implicated, the Sixth Circuit Applied an Erroneous Standard in Determining Whether There Has Been a Deprivation.

Even if it were assumed that the Sixth Amendment right to counsel's assistance is implicated because the rejection of a plea offer constitutes a "critical stage," the *Strickland-Hill* test for determining whether there has been a deprivation nonetheless focuses on whether the trial was fair (*Strickland*), or fairly forfeited through plea *acceptance* (*Hill*). By failing to recognize that a fair trial is the goal of the Sixth Amendment and, hence, *Strickland*, the Sixth Circuit applied a test not recognized by this Court to determine that there has

been a constitutional deprivation. Specifically, the Sixth Circuit never required that prejudice be shown by either: (1) A procedural or substantive entitlement that was lost due to counsel error, yielding an unfair or unreliable outcome; or, (2) A heightened burden of establishing that the outcome was nonetheless unfair or unreliable even in the absence of a lost entitlement. Instead, the Sixth Circuit *presumed* prejudice to exist.

The actual or constructive denial of counsel, state interference with counsel's assistance, and conflicts of interest, all constitute a deprivation of the right to counsel's assistance. *Strickland*, 466 U.S. at 692; *Bell v. Cone*, 535 U.S. 685, 695-96 (2002). In these situations, it is presumed that there has been prejudice to the defense. Id. Attorney error, however, does not amount to a deprivation of the right to counsel's assistance, unless it is affirmatively demonstrated that the error prejudiced the defense. *Smith v. Robbins*, 528 U.S. 259, 287 (2000); *Strickland*, 466 U.S. at 692-93.

Specifically, the defendant must show that, but for the error, "the result of the proceeding would have been different." Id. at 694. Where there has been a conviction after trial, this "different outcome" results from a showing that, but for counsel's error, the factfinder would have had a "reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Where a case is disposed of by the entry of a guilty plea, this "different result" is established by a showing that, but for the attorney's error, the defendant would not have pleaded guilty and would have insisted on proceeding to trial. *Hill*, 474 U.S. at 59.

But, a different result *alone* does not inform the prejudice inquiry. "[T]here are . . . situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate prejudice." *Williams v. Taylor*, 529 U.S. 362, 391-92 (2000). Therefore,

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

> Thus, To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" *of the trial.*

Nix v. Whiteside, 475 U.S. 157, 165 (1986), quoting *Strickland*, 466 U.S. at 694 (emphasis added).

A trial is rendered unfair, or "unreliable," if the defendant is deprived of a "substantive or procedural right to which the law entitles him." *Fretwell*, 506 U.S. at 372. In *Strickland*, this Court enumerated several things to which "[a] defendant has no entitlement," and concluded that counsel error resulting in the loss of things to which there is no entitlement does not give rise to legitimate prejudice. *Strickland*, 466 U.S. at 694-95. In subsequent cases, the Court has expounded upon this principle.

In *Nix*, this Court held that where an attorney prevents his client from testifying falsely, *Strickland* prejudice is not established, even if the false testimony would have changed the outcome of the proceeding. *Nix*, 475 U.S. at 175-76. This is so because there is no entitlement to false testimony. It is not merely the *lawlessness* of the false testimony that makes it an improper basis for *Strickland* prejudice. Instead, false testimony is an improper basis for *Strickland* prejudice because it is within a broader category of things to which there is no entitlement. *Fretwell*, 506 U.S. at 370 n. 3.

Likewise, in *Fretwell*, the petitioner claimed that he would have enjoyed a "different outcome" if his attorney made an objection which would have been based, and sustained, upon an incorrect interpretation of the law. *Fretwell*, 506 U.S. at 366. Because there is no entitlement to an incorrect interpretation of the law, the *Fretwell* petitioner was unable to show *Strickland* prejudice. *Fretwell*, 506 U.S. at 372; *see also, Id.*, at 374-75 (O'Connor, J., concurring) (prejudice inquiry "ought not be informed" by the loss of an advantage "the law simply does not recognize").

Williams v. Taylor, supra, 529 U.S. 362, presented the opposite problem. There, this Court overruled a determination that *Strickland* prejudice did not result from counsel error, even though the error *did* deprive the defendant of a right to which he *was* entitled. The lower court, misinterpreting *Fretwell*, erroneously imposed an *additional* requirement that fundamental unfairness be shown – a showing that had already been made because it was established that counsel's error resulted in the loss of a substantive or procedural right.

In the wake of *Nix*, *Fretwell*, and *Taylor*, the *Strickland* rule is firmly set: counsel error that results in the loss of a substantive or procedural right is prejudicial if, but for the error, the outcome of the trial would have been different because the factfinder would have had "a reasonable doubt respecting guilt." However, where a defendant seeks to show prejudice through the loss of an advantage to which the law does *not* entitle him, he must show not only that the outcome would have been different but for the loss, but that it was also a fundamentally unfair outcome because there is a "reasonable doubt respecting guilt." Otherwise, recompense for the loss of a right to which there is no entitlement grants the defendant a "windfall to which the law does not entitle him." *Fretwell*, 560 U.S. at 370.

1. The Sixth Circuit Abandoned the *Strickland* Calculus

Because the Sixth Circuit erroneously focused on the loss of an advantage, regardless of whether there is entitlement to it, and not whether the trial was fair, it abandoned the proper *Strickland* calculus in determining

that the Respondent was deprived of the right to counsel's assistance. The court began its analysis by stating: "If counsel provided ineffective assistance, we must *then* determine whether the petitioner was prejudiced." Pet. App. 11a (emphasis added). The court then rejected the Petitioner's argument that prejudice cannot be shown in the wake of a fair trial, stating that it "has consistently rejected such a myopic view of prejudice *from a deprivation of the right to counsel.*" Pet. App. 18a (emphasis added). Ultimately, the court concluded that the Respondent "was deprived of his constitutional right to effective assistance of counsel. *Thus, he has established prejudice.*" Pet. App. 19a (emphasis added).

The test employed by the Sixth Circuit, therefore, is inverse to the *Strickland* calculus. Instead of finding deficient performance and prejudice to exist, and then concluding that counsel was constitutionally ineffective as a result, the Sixth Circuit first determined there to be a constitutional deprivation of counsel's assistance, presumably from counsel's deficient performance alone. Under the Sixth Circuit's view, the finding of prejudice became unnecessary to the determination of whether there was a Sixth Amendment violation – it concluded there to be a violation *before* it considered prejudice. This had the effect of erroneously placing this case among those where prejudice is presumed. It also made this case solely about the "quality of legal representation," against which *Strickland* counsels. *Strickland*, 466 U.S. at 689.

The Sixth Circuit's approach exhibits more than mere semantic confusion between the terms "deficient

performance" and "ineffective assistance" – the former being a component of the *Strickland* calculus, and the latter being the ultimate inquiry under *Strickland*. The test employed by the Sixth Circuit evidences a structural defect in its analysis that becomes even more apparent upon further review of its decision, in which legitimate *Strickland* prejudice is never considered.

This Respondent's rejection of the prosecutor's offer did not cause him to lose any substantive or procedural right. Accordingly, to establish prejudice, he was required to show, nonetheless, that the outcome of his trial was fundamentally unfair because there is a reasonable doubt respecting his guilt. The Sixth Circuit contravened this Court's precedents when it found prejudice in the absence of such a showing, and granted to this Respondent a "windfall to which the law does not entitle him."

2. The Sixth Circuit Failed to Identify Legitimate *Strickland* Prejudice

In rejecting the plea offer, the petitioner lost no substantive or procedural right to which the law entitled him. Nonetheless, the Sixth Circuit found prejudice because, but for counsel's error, the Respondent would have accepted the plea offer, and would have received a shorter sentence. Again, the Sixth Circuit's reasoning exhibits a fundamental misapplication of *Strickland*. The *Strickland* inquiry is not: "What would have happened?" Rather, the proper question is, "what was the Respondent *entitled* to have happen?" The Respondent was not entitled to the plea offer, or to have

the Court impose its terms, and was not entitled to a shorter sentence.

The law does not entitle a defendant to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Nor did the prosecutor's discretionary action in making the offer give rise to an entitlement, because it did not bind the trial court to accept it. *Mabry*, 467 U.S. at 508 & n. 5.; *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *see also*, Michigan Rules of Court § 6302(c)(3) (trial court in Michigan retains discretion to accept or reject recommended plea offer). Finally, the law does not entitle the Respondent to a shorter sentence.

In *Townsend v. Burke*, 334 U.S. 736 (1948), this Court ruled that a sentence based upon misinformation constituted a denial of due process. But, the Court explicitly cautioned:

> We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially

> false . . . that renders the proceedings lacking in due process.

Townsend, 334 U.S. at 741; *see also, Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (In general, "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (same).

More recently, the Court similarly found prejudice where the failure to object to an *error of law* resulted in a sentence two levels above the correct federal guidelines range. *Glover v. United States*, 531 U.S. 198 (2001). In other words, the sentence was "not within the limits set by statute." *Townsend, supra*, at 741; *see United States v. Booker*, 543 U.S. 220, 233-34 (2005) (federal sentencing guidelines "have the force and effect of laws"). Once again, though, the Court cautioned:

> This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, it if had been error, would have been correctable on appeal.

Glover, 531 U.S. at 204.[4]

---

[4] Some courts have properly recognized *Glover's* principle that a sentence "outside the limits set by statute," no matter how slightly, is nonetheless prejudicial, while a harsher, but nonetheless correct, sentence is not. *See, e.g., Hammond v. Hall*, 586 F.3d 1289, 1335 (continued...)

Thus, this Court has made clear that, while there is an entitlement to a correct sentence, there is no entitlement to a shorter sentence. Put another way, a "harsher sentence," but nonetheless "within the limits set by statute," does not constitute legitimate *Strickland* prejudice.

By all accounts, the sentence imposed here is within the limits of the crimes for which this Respondent was found guilty following a fair trial, and there was no legal error in the sentence itself that would have been "correctable on appeal." Nor was the sentence predicated upon misinformation, as in *Townsend*. In fact, the situation here is just the opposite. The Respondent's sentence rests upon an abundance of information that was fully scrutinized at trial and sentencing. The crux of the Sixth Circuit's grant of relief, however, is that acceptance of the plea offer would have eclipsed such an investigation, permitting the

---

[4](...continued)
n.19 (11th Cir. 2009). Other courts have erroneously construed *Glover* as holding that even a slightly harsher sentence within the limits set by statute constitutes *Strickland* prejudice. *See, e.g., Ebron v. Commissioner of Correction*, 120 Conn. App. 560, 582, *cert. granted*, 297 Conn. 912 (1020). The Fifth Circuit has attempted to reconcile what it perceives as this Court's rule that "any amount of jail time" constitutes *Strickland* prejudice, with the recognition that, because of the discretionary nature of state sentencing structures, "practically any error committed by counsel [could] result in a harsher sentence." In doing so, the Fifth Circuit treats prisoners sentenced in federal court unequally to those sentenced in state courts, and applies the perceived *Glover* rule only in federal sentencing cases. *United States v. Grammas*, 376 F.3d 433, 438 & n.4 (5th Cir. 2004. *Amici* respectfully suggest that a grant of certiorari in this case will provide an opportunity to clarify the *Glover* principle.

Respondent to escape the just consequences of his actions, and receive a shorter sentence. No case from this Court holds that the Sixth Amendment guarantees an outcome that is blind to the full extent of a defendant's crimes. Quite to the contrary, having been found guilty upon a fair trial, there is no doubt respecting this Respondent's guilt, and the Sixth Circuit's ruling in this case endows him with exactly the type of "windfall" to which this Court has said the law does not entitle him.

CONCLUSION

Although this Court has not clearly established that a Sixth Amendment violation is cognizable in the plea rejection context, the Court has clearly established the precedents that should have guided the subsidiary determinations of whether plea rejection constitutes a "critical stage" at which the Constitution guarantees counsel's assistance, and whether it gives rise to legitimate *Strickland* prejudice. The Sixth Circuit's determinations on these predicate inquiries contravene this Court's decisions. Therefore, review by this Court is warranted.

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PETITIONER'S BRIEF

RECORD AND BRIEFS

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In the Supreme Court of the United States

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

A defendant raising an ineffective-assistance claim must prove that counsel's conduct deprived the defendant of a "substantive or procedural right," *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993), and show that the deprivation so undermined the process that the reliability of the trial result is called into question, *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

Here, Anthony Cooper faced charges of assault with intent to murder. Based on a misunderstanding of Michigan law, Cooper's counsel advised him to reject a plea offer. Cooper rejected the offer and was convicted; he does not contest that he received a fair trial. The questions presented for review are:

1. Whether a defendant seeking habeas is entitled to relief based on ineffective assistance of counsel where counsel's deficient advice caused the defendant to reject a plea bargain in which the defendant had no vested right, and where the rejection did not deny the defendant a fair trial.

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The Petitioner is Blaine Lafler, Warden of a Michigan correctional facility. The Respondent is Anthony Cooper, an inmate.

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OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished. Pet. App. 1a–22a. The order of the United States District Court granting the petition is also unpublished. Pet. App. 24a–42a. The decision of the Michigan Court of Appeals affirming Cooper's conviction is also unpublished. Pet. App. 44a–47a.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court

proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

INTRODUCTION

This Court has construed the Sixth Amendment to guarantee effective assistance of counsel at all critical stages of a criminal proceeding. But not every deficient act of counsel violates the Amendment. A defendant pursuing an ineffective-assistance claim must be able to prove actual prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). And there is no unreliability unless the defendant can show that ineffective assistance deprived him of a "substantive or procedural right to which the law entitles him." *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993).

The question presented here is whether there has been a Sixth Amendment violation when a defendant alleges that ineffective assistance caused him to reject a favorable plea offer, and he was subsequently convicted at a fair and constitutional trial. The answer is no, for three reasons.

First, a decision to enter a not-guilty plea does not diminish a defendant's right to a fair trial. To the contrary, deciding to plead "not guilty" invokes the constitutional right to a trial. And if that trial is fairly conducted, the Sixth Amendment requires nothing more. In that important respect, a not-guilty plea is very different than a decision to accept a plea offer, which necessarily involves giving up the right to a trial and all the constitutional protections a trial entails.

Second, a defendant has no "substantive or procedural right" to a plea deal. A prosecutor is not obliged

to make a plea offer, nor required to keep an offer open once made. And even if a defendant accepts a plea offer, the trial court need not accept it. That is why this Court has held that "there is no constitutional right to plea bargain," *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1997), much less a right to a particular plea deal. As a result, a defendant cannot use a rejected plea offer to establish the threshold showing under *Fretwell* that ineffective assistance deprived the defendant of a substantive or procedural right.

Third, there is no rational remedy for alleged ineffective assistance in the rejection of a plea offer. Forcing a prosecutor to re-offer a plea *after* a fair trial has been conducted places the defendant in a better position than he would have been in had he received adequate representation, and also violates separation-of-power principles. Requiring a prosecutor to conduct a new trial makes no sense, because a duplicative trial does not restore the alleged lost opportunity to plead. Other, hybrid remedies are similarly unworkable. These intractable difficulties in fashioning an appropriate remedy emphasize that a defendant has no substantive or procedural right to a particular plea offer.

Accordingly, the State of Michigan respectfully requests that the Court reverse the Sixth Circuit's ruling and hold that there is no Sixth Amendment violation when, after being convicted pursuant to a fair trial, a defendant claims that ineffective assistance caused him to reject a favorable plea offer. Alternatively, the State asks that the Court reverse because the Sixth Circuit's view was not "clearly established" at the time of conviction, as 28 U.S.C. § 2254(d) requires before a court may grant habeas relief.

STATEMENT OF THE CASE

A. Cooper's crime and the plea offer

On March 25, 2003, Anthony Cooper shot Kali Mundy four times as she was fleeing from him, hitting her twice in the right buttock, once in the hip, and once to the right side of her abdomen. Pet. App. 27a. Mundy survived her "potentially fatal" wounds after a three-week hospital stay. Pet. App. 27a.

Cooper was arrested soon after the shooting and was charged with three crimes: assault with intent to murder, possession of a firearm by a felon, and using a firearm during the course of a felony. The lead charge of assault with intent to murder carries up to a maximum punishment of life imprisonment under Michigan law. Mich. Comp. Laws § 750.83.

At his July 17, 2003 pretrial, Cooper was offered the opportunity to plead guilty to the charge of assault with intent to murder with an agreement that the guidelines governing the lower-end of the sentence would be calculated as 51-to-85 months, and that Cooper's minimum sentence would be within that range.[1] Pet. App. 49a. Cooper's counsel indicated on

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[1] Unlike the federal system, Michigan has an indeterminate sentencing scheme in which a criminal defendant is given a minimum sentence and a maximum sentence. *People* v. *Lowe*, 484 Mich. 718, 724; 773 N.W.2d 1, 3–4 (2009). As a consequence of truth-in-sentencing legislation, an offender will generally serve his minimum sentence. See Mich. Comp. Laws § 791.234(1). Once the minimum is served, the decision whether to hold the criminal defendant beyond the minimum sentence is vested with the parole board. *People* v. *Idziak*, 484 Mich. 549, 555; 773 N.W.2d 616, 620 (2009).

the record that Cooper was rejecting the offer because the medical records did not support the conclusion that this was assault with intent to murder, and Cooper was going to await a better plea offer:

> I think the evidence will show that there is insufficient evidence. . . . By the way we have rescheduled these dates and I just got the medicals, and I have reviewed the nature of the injuries of the person.
>
> After reviewing the medical report, your Honor, I believe that the [p]rosecution does not have the evidence to try this case. We're willing to go to trial, but in the interest of [j]ustice and due to the fact that [the courtroom prosecutor] is not trying the case, I would like to discuss this matter with the attorney [who] will . . . make the case for the [p]rosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.

Pet. App. 49a.

Cooper's counsel was hoping to receive a plea offer for the lesser crime of assault with intent to do great bodily harm less than murder, which is a ten-year statutory maximum under Michigan law, Mich. Comp. Laws § 750.84, and would further reduce the guidelines. Pet. App. 30a. Thus, Cooper's counsel informed the court that "[w]e're just rejecting the offer." Pet. App. 51a.

On the first day of trial, the prosecutor offered Cooper a plea to assault with intent to murder with an

agreement that the guidelines for the lower end of the sentence would be 126-to-210 months, to run consecutive to the two years that Cooper would serve for possessing a firearm during the course of a felony. Cooper's counsel also rejected this offer. Pet. App. 29a.

Cooper was convicted as charged. At sentencing, the guidelines for the lower-end of the charge for assault with intent to commit murder were calculated as 135-to-225 months, enhanced to a range of 135-to-281 months based on Cooper's status as a habitual offender. Cooper was ultimately sentenced to 185 to 360 months for the assault with intent to commit murder, to run consecutively with his two years for possessing a firearm during the course of a felony. Pet. App. 44a. Significantly, even if Cooper had accepted the original plea offer, the Michigan trial court would have been free to reject it. Mich. Ct. Rule 6.302(C)(3). Accord Fed. R. Crim. P. 11(c)(3)(A) (even if the government agrees that a particular sentencing range is the appropriate disposition of the case, the court may "reject it").

B. State-court review of Cooper's conviction

Following his jury-trial conviction, Cooper filed a post-conviction motion in Michigan trial court, claiming that his counsel was ineffective for providing deficient legal advice at the plea stage. There was a hearing held on this motion over two days in the trial court. After Cooper's trial counsel testified, and after Cooper testified, the trial court rejected the claim. Pet. App. 53a, 54a.

The Michigan Court of Appeals affirmed in an unpublished opinion, holding that Cooper rejected the plea offers and elected to go to trial:

> [Cooper] contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that [Cooper] knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support [Cooper's] contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for [Cooper.]

Pet. App. 45a. The Michigan Supreme Court denied leave without dissent. Pet. App. 43a.

C. Habeas review

In federal district court, Cooper's sole habeas claim was that trial counsel provided incompetent advice during the plea bargaining process. Pet. App. 32a. In reviewing this claim, the federal district court determined that Cooper's trial counsel did provide affirmatively deficient advice in wrongly asserting that "the victim's injuries did not satisfy the necessary elements for the charge of assault-with-intent-to murder." Pet. App. 39a–40a. The federal court concluded that the decision of the Michigan Court of Appeals was an erroneous application of clearly established law by failing to account for this point. Pet. App. 40a.

The federal district court then decided that the appropriate remedy was to order "specific performance," conditioning the writ on the re-conveyance of the original plea offer. Pet. App. 41a.

On appeal, the State claimed that there was no deficient performance, no prejudice to Cooper, and that there was no clearly established Supreme Court precedent that supported such a remedy. Pet. App. 12a–20a. The Sixth Circuit rejected these claims.

Regarding deficiency, the Sixth Circuit rejected the State's argument that Cooper's counsel was only "offer[ing] a prediction about the outcome of the trial." Pet. App. 15a. The Sixth Circuit relied on trial counsel's testimony from the post-conviction hearing at which he stated that the charge "could not be supported by the evidence."[2] Pet. App. 15a.

Regarding prejudice, the Sixth Circuit did not address whether a defendant has a substantive or procedural right to a plea offer. Instead, the Court only applied *Strickland*'s prejudice test and, in applying that test, did not consider whether counsel's conduct so undermined the adversarial process as to call into question the trial's reliability. Contra *Strickland*, 466 U.S. at 686, 687. According to the Sixth Circuit, a defendant claiming ineffective assistance is only obligated to show that "there is a reasonable

---

[2] As noted in the State's reply brief in support of the petition for certiorari, p. 14 n.34, the State does not contest the deficiency of Cooper's counsel at the plea stage. The State does note, however, that the underlying factual claims here demonstrate the ease by which criminal defendants and habeas petitioners may second-guess the pre-conviction plea advice that trial counsel provided.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 11a–12a. Under that standard, the Sixth Circuit concluded that Cooper was prejudiced because he could have accepted a plea for a shorter sentence: "[Cooper] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him . . . . Thus, he has established prejudice." Pet. App. 19a.

Finally, regarding remedy, the Sixth Circuit said that clearly established Supreme Court precedent is "not relevant" when fashioning a habeas remedy, because the law on remedy is not governed by § 2254(d). Pet. App. 20a. In reviewing for an abuse of discretion, the Sixth Circuit determined that the relief the district court ordered was appropriate. The State must either offer the original plea deal to Cooper or release him from custody. Pet. App. 21a n.5.

On August 9, 2010, the State timely filed a petition for certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). The Court granted the petition on January 7, 2011.

SUMMARY OF ARGUMENT

Cooper's habeas petition fails for two basic reasons. First, Cooper is unable to establish that his counsel's ineffective assistance caused *Strickland* prejudice, i.e., that his counsel's defective advice so undermined the process that the reliability of Cooper's trial result is called into question. *Strickland*, 466 U.S. at 687. To the contrary, Cooper does not contest in federal court the point that he received a fair and constitutional

trial. Moreover, Cooper cannot show that his counsel's conduct deprived him of any substantive or procedural right. This Court has correctly recognized that "there is no constitutional right to plea bargain," *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1997), much less a right to a particular plea deal. This point is emphasized when analyzing the conflicting and constitutionally suspect remedies that federal courts have tried to fashion when a defendant claims that ineffective assistance caused the defendant to reject a plea offer and invoke his constitutional right to a trial. The difficulty in designing a suitable remedy flows from the fact that there has been no denial of a substantive or procedural right in the first instance.

Second, Cooper is unable to show that his right to relief was "clearly established" by this Court's precedent at the time of his conviction. This Court has never held that *Strickland* is or should be watered down in the context of a rejected plea offer, nor has the Court endorsed the theory that a defendant has a substantive or procedural right in a particular plea offer. Absent such precedent, 28 U.S.C. § 2254(d) precludes habeas relief.

Strickland and its progeny make clear that when a court reviews a trial-court criminal proceeding, a fair trial is the main event; alleged error that does not impact a trial's reliability does not implicate the Sixth Amendment. Given the widespread use of plea agreements, a decision that adopts the Sixth Circuit's approach will invite ineffective-assistance claims following virtually every fair and constitutional trial. This Court should emphatically reject the invitation to create such a system.

ARGUMENT

I. Ineffective assistance leading to the rejection of a plea offer does not deprive a defendant of a substantive or procedural right that renders a subsequent trial unfair as to undermine confidence in the trial's outcome.

In *Strickland*, this Court established the familiar two-part test for establishing a claim of ineffective assistance of counsel.[3] "First, the defendant must show that counsel's performance was deficient." 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid.* In other words, the touchstone for proving *Strickland* prejudice is whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

This Court refined *Strickland*'s prejudice analysis in *Fretwell*. *Fretwell* clarified the point that showing the unreliability of a trial is not an abstract proposition, but affirmatively requires a defendant to prove that he was deprived of a substantive or

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[3] The *Strickland* test only applies if the rejection of a plea offer is a "critical stage" of the criminal proceedings. This Court made clear in *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010), *Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), that *acceptance* of a plea offer is a "critical stage." Whether *Padilla*, *Tovar*, and *Hill* should be extended to not-guilty pleas is an open question. For purposes of the following argument, the State will assume that *Strickland* applies.

procedural right. 506 U.S. at 372 ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."). Accordingly, this Court has rejected ineffective-assistance claims where the defendant could not make this threshold showing. E.g., *Nix* v. *Whiteside*, 475 U.S. 157 (1986) (Sixth Amendment not violated by attorney who refused to cooperate in presenting perjured testimony).

Here, Cooper is unable to demonstrate that attorney error caused his conviction to be unreliable, and he is also unable to prove that he has a substantive or procedural right to a plea deal.

A. A convicted criminal's inability to fairly assess a plea offer does not, by itself, undermine confidence in the outcome of a subsequent trial.

Cooper is unable to demonstrate that his counsel's deficient performance at the plea stage cast doubt on the reliability of his conviction following trial. Absent such proof, Cooper's Sixth Amendment claim fails. *Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

This Court has held that the right to effective assistance of counsel is "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a *fair trial*." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984) (emphasis added).

Thus, "absent some effect of the challenged conduct *on the reliability of the trial process*, the Sixth Amendment guarantee is generally not implicated." *Ibid.* (emphasis added). Accord, e.g., *United States* v. *Gonzalez*, 126 S. Ct. 2557, 2563 (2006) (unlike the right to counsel of choice, the right to effective assistance of counsel is derived from the right to a fair trial); *United States* v. *Wade*, 388 U.S. 218, 227–28 (1967) (pretrial lineup is a critical stage, but analysis of accused's fingerprints, blood samples, clothing, and hair did not implicate a right to counsel because there was little risk counsel's absence would damage defendant's "right to a fair trial").

And although this Court has never had the opportunity to apply *Strickland* to a not-guilty plea, a per curiam opinion of the Court applied a parallel analysis to a Vienna Convention claim in *Breard* v. *Greene*, 523 U.S. 371 (1998). There, a convicted foreign national filed a federal habeas petition, alleging that state authorities violated the consular-notification provisions of the Vienna Convention. The foreign national's asserted claim of prejudice was that, "had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty." *Id.* at 376.

After noting that the foreign national had not properly raised and proved his claim, this Court reiterated the necessity of showing a prejudicial impact on the trial itself: "it is extremely doubtful that the [Vienna Convention] violation should result in the overturning of a final judgment of conviction *without some showing that the violation had an effect on the trial*." 523 U.S. at 371 (citing *Arizona* v. *Fulminante*,

499 U.S. 279 (1991) (emphasis added)). The same is true here.

Once it is understood that an ineffective-assistance claim requires proof of an unreliable trial result (including the sentence), there is remarkably little over which to argue. Cooper has pointed to nothing in his counsel's conduct suggesting that Cooper's trial cannot be relied on as having produced a just result. Rather, he now effectively concedes that he had a fundamentally fair trial.[4] While it might be theoretically possible that attorney error during the plea process could render a subsequent trial unfair, that is not this case. Cooper admittedly received the fundamental right that the Sixth Amendment protects—a fair trial. And that is the end of the *Strickland* analysis. A defendant who argues that his lawyer's incompetence *resulted* in a fair and reliable trial cannot prove a claim under *Strickland*.

Every circuit court to address the issue presented by this case reached the wrong result by collapsing the *Strickland* prejudice analysis into a "best-outcome test."[5] E.g. Pet. App. 19a ("[Cooper] lost out on an

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[4] Cooper raised two claims in State court regarding his trial counsel's performance that allegedly affected the trial but did not re-assert these claims in his habeas petition. Pet. App. 29a–30a, 32a.

[5] The genesis for this test appears to be this Court's statement in *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985), that the *Strickland* prejudice prong "focuses on whether counsel's constitutionally ineffective performance *affected the outcome* of the plea process." (emphasis added). An outcome-based test may be appropriate where a plea is accepted, as in *Hill*, because in that situation, a defendant gives up his right to a fair trial. But there is no corresponding rationale when a defendant *invokes* his trial rights.

opportunity to plead guilty and receive the lower sentence that was offered to him . . . . Thus, he has established prejudice."); accord *United States* v. *Day*, 969 F.2d 39, 44 (3d Cir. 1992) ("Failure by defense counsel to communicate a plea offer to defendant deprives defendant of the opportunity to present a plea bargain for the consideration of the state judge . . . . A subsequent fair trial does not remedy this deprivation."); *United States* v. *Herrera*, 412 F.3d 577, 581 (5th Cir. 2005) ("a 27-month increase in a sentence constitutes prejudice"); *Julian* v. *Bartley*, 495 F.3d 487, 499 (7th Cir. 2007) ("but for the ill-advice, Julian would have taken the plea"); *Nunes* v. *Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) (defendant made out a prima facie case of ineffective assistance by alleging that if he had "been informed accurately, he would expressly have taken the bargain"); *Williams* v. *Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) ("the prejudice Mr. Williams identified was that, had he been adequately counseled, there is a reasonable probability that he would have accepted the plea offer"). This Court should reject such a watered-down formulation of the *Strickland* prejudice requirement.

The *Strickland* opinion expressly disclaimed outcome as the *sine qua non* of prejudice. 466 U.S. at 694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."). Rather, proof of prejudice depends on the *reliability* of the trial result, *id.* at 686, 687, a factor that is unaffected by counsel's competency when rejecting a plea offer. And there is a sound reason for such a stringent formulation: "Virtually every act or omission of counsel would meet [the best-outcome] test." *Id.* at 694.

This Court has recognized that the plea-bargaining context is a particularly vital area for a strict application of *Strickland*'s principles. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risk." *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011). "These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage." *Ibid.* Accordingly, "ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect." *Ibid.* "The prospect that a plea deal will afterward be unraveled [or, in this case, imposed after a fair and constitutional trial] when a court second-guesses counsel's decision while failing to accord the latitude *Strickland* mandates . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one." *Id.* at 742.

What seems to have led the circuits to abandon the *Strickland* formulation in the context of rejected plea offers is a concern that a defendant who rejects such an offer based on faulty advice has lost an opportunity. But there is nothing novel about the fact that some lost opportunities in the criminal process do not shake confidence in the ultimate result, provided the defendant receives a fair trial. *Williams* v. *Jones*, 571 F.3d 1086, 1103 (2009) (Gorsuch, J., dissenting).

This Court made that exact point in *United States* v. *Mechanik*, 475 U.S. 66 (1986). There, the prosecution violated Federal Rule of Criminal Procedure 6(d) by allowing two witnesses to give simultaneous testimony

before the grand jury. The indictment might have been dismissed had that violation been brought timely to the trial court's attention. *Id.* at 69–70. Instead, the trial proceeded to conviction, and this Court held that any error in the grand-jury proceeding was washed away by the guilty verdict. *Id.* at 70. In other words, the fair trial extinguished any error that occurred at the grand-jury stage. This is the ordinary way harmless error operates. "[E]ven when a criminal trial might have been averted through the assertion of an entitlement to dismiss the indictment outright, the fact that the defendant subsequently received a fair trial was enough to preclude reversal." *Williams*, 571 F.3d at 1103 (Gorsuch, J., dissenting). It is difficult to see why the Constitution would treat the present situation any differently.

The result is the same if counsel is ineffective at a preliminary hearing. The preliminary hearing is a critical stage of the criminal process, and an indigent criminal defendant is entitled to the appointment of counsel.[6] *Coleman* v. *Alabama*, 399 U.S. 1, 9–10 (1970). Depending on the state, the prosecution ordinarily establishes that there is sufficient evidence to support probable cause to allow the "bind over" of the criminal defendant to the next stage in the criminal process. 4 W. LaFave, J. Israel, N King & O. Kerr, Criminal Procedure § 14.1(a) (3d 2007), p. 274. See, e.g., Mich. Comp. Laws § 766.13. But there is generally no remedy for an error at this preliminary hearing when raised post-conviction unless the defendant can show that he was deprived of a fair trial as a result of the

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[6] Michigan is an information state, which provides for a preliminary examination. Mich. Comp. Law § 766.1 *et. seq.*

preliminary-examination error. *People* v. *Pompa-Ortiz*, 27 Cal.3d 519, 529; 612 P.2d 941, 947 (1980); accord *People* v. *Hall*, 435 Mich. 599, 615–16; 460 N.W.2d 520, 528 (1990) ("the error at the preliminary examination was unrelated to the issues which were the focus of the trial") (citing *Mechanik*, 475 U.S. at 72). This appears to be the majority rule. 4 W. LaFave et al, Criminal Procedure § 14.4(e), p. 368 ("[m]ost [courts] take the view that the conviction should be treated as having automatically rendered harmless the magistrate's error.").

This same principle applies when preliminary-hearing error arises specifically from the deficient performance of counsel: there is no remedy if that ineffective assistance does not affect the fairness of trial. See, e.g. *People* v. *Coleman*, 46 Cal. 3d 749, 773; 759 P.2d 1260, 1275-1276 (1988) (rejecting a request to dismiss the information under state law for an error at the preliminary hearing when raised on appeal post-conviction because any ineffective assistance of counsel at the preliminary examination did not affect the trial/ counsel's performance at trial and therefore was not prejudicial.). That is why this Court has recognized that failure to provide counsel at a preliminary hearing is subject to a harmless error analysis, even though the hearing is a critical stage. *Coleman* v. *Alabama*, 399 U.S. at 11; see also *Coleman* v. *Alabama* , 399 U.S. at 20 (Harlan, J., concurring in part and dissenting in part) ("I do not think that reversal of these convictions, for lack of counsel at the preliminary hearing, should follow unless petitioners are able to show on remand that they have been prejudiced in their defense at trial"). Unless a criminal defendant can prove prejudice at trial, the vacating of the conviction and beginning

the process again would be an unjustified "windfall." See *State* v. *Webb*, 467 N.W.2d 108, 112 (Wis. 1991). The same is true here, where Cooper has received precisely the sentence that a legislative body prescribed for the crimes Cooper committed.

Migrating from this Court's reliable-trial test to the Sixth Circuit's best-outcome test would have a serious and detrimental practical implication: opening the floodgates to post-conviction litigation. "Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the [trial] court's constitutional holdings, has a claim of deficient performance." *Hoffman* v. *Arave*, 481 F.3d 686, 688 (9th Cir. 2007) (Kozinski, O'Scannlain, Kleinfeld, Tallman, Bybee, and Callahan, JJ., dissenting from denial of rehearing en banc).

Worse yet, a best-outcome test allows a defendant to play with house money. "So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting). This incentive will inevitably reduce the number of pleas accepted in the first instance, severely burdening law-enforcement and prosecutorial resources. Such an adverse impact can be wholly avoided simply by reaffirming the *Strickland* prejudice test that has governed this area of the law for more than a quarter century.

B. Defective advice that results in entry of a not-guilty plea does not deprive a defendant of any substantive or procedural right.

In addition to Cooper's inability to prove the unreliability of his jury-trial conviction, Cooper is unable to show that ineffective assistance deprived him of a substantive or procedural right. *Fretwell*, 506 U.S. at 372; accord *Williams* v. *Taylor*, 529 U.S. 362, 393 n.17 (2000) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."). Cooper's inability to make this showing provides a separate and independent ground for reversal.

Cooper does not allege that there was any constitutional defect in his trial, conviction, or sentencing, so he is left with the theory that a lawyer's bad advice caused Cooper to reject a favorable plea offer. The problem with Cooper's theory is that "there is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). First, a prosecutor has no obligation to offer a plea deal and is free to withdraw any plea offer made. As this Court noted in *Weatherford*, a "prosecutor need not [plea bargain] if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* That is because plea offers represent prosecutorial grace, not a substantive or procedural right.

Second, even where a prosecutor chooses to offer a plea deal, and the defendant elects to accept it, it is the trial court that retains ultimate authority whether to

effectuate the deal. Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may (a) reject the agreement . . ."); Fed. R. Crim. P. 11(c)(3)(A) (even if the government agrees that a particular sentencing range is the appropriate disposition of the case, the court may "reject it"). *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) (a defendant may not force a trial court to adopt an accepted bargain, even if the prosecutor chooses to honor the agreement). As this Court observed in *Mabry* v. *Johnson*, 467 U.S. 504 (1984), a "plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest."

If an accused has no constitutional right to plea bargain, then it follows logically that the accused has no constitutional right *to a particular* plea bargain. Yet that is precisely the "right" that Cooper invokes here.[7] In the absence of any other alleged deprivation, Cooper is unable to satisfy the threshold requirement that

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[7] To the extent Cooper tries to invoke a "right to competent counsel when considering a plea offer," his reasoning is circular. Assuming, *arguendo*, that plea bargaining is a critical stage, Cooper is already guaranteed a right to competent counsel; the question is whether counsel's defective advice caused *Strickland* prejudice, i.e., denied Cooper's right to a reliable trial. Because a defendant cannot show *Strickland* prejudice unless he has been deprived of a substantive or procedural right, the lack of any right to a particular plea offer is dispositive on the issue of prejudice.

ineffective assistance of counsel deprived him of a substantive or procedural right to a plea bargain.

II. There is no rational remedy for alleged ineffective assistance in the rejection of a plea offer.

Even if the Court were to reverse longstanding precedent and hold both that a defendant has a constitutional right to a plea offer, and that a deprivation of that right casts doubt on the validity of an otherwise constitutional trial, there is still the problem of fashioning an appropriate remedy. When ineffective assistance causes a defendant to accept a plea, the obvious remedy is to allow the defendant to rescind the plea and proceed with his constitutionally guaranteed fair trial. But when a defendant rejects a plea, "it is impossible to resuscitate the original opportunity." *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007). "Courts cannot recreate the balance of risks and incentives on both sides that existed prior to trial, and the attempts to do so raise their own serious constitutional problems." *Ibid.* (quotation omitted).

First, consider the remedy the Sixth Circuit endorsed here: requiring the prosecutor to either reoffer the rejected plea deal or release the convicted criminal. Pet. App. 8a, 19a–22a.[8] To begin, such a remedy places Cooper in a *better* position than he was in before the alleged ineffective assistance. "Even if [a defendant] had managed to accept [a] plea offer, under Supreme Court precedent the prosecutor would have been free to withdraw it on a whim, and the state trial

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[8] Accord, e.g., *Hoffman* v. *Arave*, 455 F.3d 926, 943–43 (9th Cir. 2006); *State* v. *Kraus*, 397 N.W.2d 671, 676 (Iowa 1986).

judge would have been free to reject it or to impose a different sentence than the one contemplated by the parties' plea." *Williams*, 571 F.3d 1086, 1109 (Gorsuch, J., dissenting). Ordering specific performance of a plea agreement confers on a defendant a legal entitlement, rather than a mere chance, to a particular sentence. *Ibid.*

Equally important, the Sixth Circuit's remedy ignores the substantial change in circumstances. Plea offers are typically made to avoid the expense and risk of a trial. *Greuber*, 165 P.3d at 1190.But the state has already accepted these burdens once a case has been tried to verdict. Moreover, in the absence of prosecutorial misconduct, courts lack the power to require a prosecutor to dismiss charges. Imposing such a requirement if a prosecutor refuses to re-offer a plea deal violates separation-of-power principles. *Ibid.* (citation omitted); *Williams*, 571 F.3d at 1103 (Gorsuch, J., dissenting) ("It has long been settled that . . . 'the Executive Branch has exclusive authority and absolute discretion' to select its charge.") (quoting *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2565 (2008)). In sum, forcing a prosecutor to re-offer a plea deal or release is not an appropriate remedy.

Next, consider a remedy that many other courts have endorsed: requiring the prosecution to conduct a new trial. E.g., *United States* v. *Gordon*, 156 F.3d 376, 381–82 (2d Cir. 1998).[9] Such a remedy bears little relation to the alleged harm. That is because a new trial does not restore an alleged lost opportunity to

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[9] Accord, e.g., *State* v. *Tacetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *People* v. *Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State* v. *Lentowski*, 569 N.W.2d 768, 761–62 (Wis. 1997).

plead. *State* v. *Kraus*, 397 N.W.2d 671, 674 (Iowa 1986) ("[I]t is difficult to see how a new trial restores the lost chance of the bargain."). More fundamentally, the remedy is nonsensical, regardless of the second trial's result. The remedy to a loss of a plea cannot be the replay of a fair trial with the same evidence presented against the criminal defendant. Even if the prosecution prevails, the state will have been forced to expend precious resources conducting an unnecessary and duplicate trial. *Greuber*, 165 P.3d at 1190 (citation omitted). And if witnesses have died, or evidence is unavailable, a second trial may result in acquittal, "a 'remedy' out of all proportion to the damage allegedly done by the ineffective assistance in connection with the earlier plea offer." *Id.* at 1191.

Finally, consider other creative remedies that courts have endorsed. E.g., *Boria* v. *Keane*, 99 F.3d 492, 498–99 (2d Cir. 1996) (ordering defendant's sentence to be reduced to time served); *Beckham* v. *Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (granting the alternative of either reinstatement of the original plea offer or a new trial); *Tucker* v. *Holland*, 327 S.E.2d 388, 396 (W. Va. 1985) (refusing to reinstate original plea offer but directing the trial court to consider that plea for approval). Such remedies represent sentencing by judicial fiat, giving no respect (much less authority) to prosecutorial discretion or legislative sentencing guidelines.

In sum, there is no rational remedy for alleged ineffective assistance of counsel resulting in the rejection of a plea offer. And the difficulty in fashioning an appropriate remedy emphasizes why there is no constitutional violation in the first instance: because a

criminal defendant has no constitutional right to the plea offer he asserts was lost as a result of his counsel's ineffective assistance, and because the rejection of a plea offer does not call into question the reliability of a subsequent trial. This Court should decline the invitation to concoct a non-constitutional remedy.

III. The state-court decision rejecting Cooper's claim for relief was not an unreasonable application of clearly established Supreme Court precedent under AEDPA.

A federal court may not grant habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) unless a state-court merits ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Accordingly, if the state-court decisions here are entitled to AEDPA deference, Cooper's habeas petition necessarily fails, because this Court has not previously resolved the issue whether a conviction obtained at a fair trial must be set aside because deficient advice led a defendant to plead not guilty.

In fact, both state-court decisions are entitled to deference. The Michigan Court of Appeals did not expressly say whether it was rejecting Cooper's claim on the first or second *Strickland* prong. But its opinion was undeniably an adjudication on the merits and therefore entitled to deference under this Court's recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), which gave deference to a summary order that contained no reasoning whatsoever. If courts must give AEDPA deference to an order with no reasoning, it

follows logically that courts should defer to an order that provides only limited reasoning.

Alternatively, the Michigan trial court opinion, when fairly read, did address prejudice, suggesting that Cooper would not have accepted the prosecution's plea offer even if his counsel had properly advised him. As the last reasoned decision of a state court with respect to the prejudice issue, that issue is entitled to deference under *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803–04 (1991). In other words, even if the Court is inclined to grant deference to a wholly unexplained order but no deference to a partially explained order, then the Court should look to the last place containing an analysis—the Michigan trial court. Regardless, deference is owed to the state-court decisions under AEDPA, and that deference is dispositive.

A. The Michigan state-court decisions are entitled to deference.

In rejecting Cooper's claim that ineffective assistance caused him to enter a not-guilty plea, the Michigan Court of Appeals did not expressly say whether it was addressing prong one (ineffective assistance) or prong two (prejudice) of the *Strickland* test. Rather, the court simply noted that Cooper's decision to plead guilty was knowing and intelligent, and that the record did not support his claim. Pet. App. 45a. That partial explanation logically brings this case within the scope of *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), in which this Court held that even a state-court summary order (i.e., one with no explanation at all) is entitled to AEDPA deference, provided the order is on the merits. That is because it is the state-court

decision itself that is entitled to deference, not the reasons underlying that decision.

In *Harrington*, this Court resolved the issue "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied," where the summary order rejected a claim of ineffective assistance of counsel. 131 S. Ct. at 784. In determining that such an order *was* entitled to deference, this Court noted that the habeas statute refers to a "decision" that resulted from an adjudication, not to an issue or an analysis:

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so *whether or not* the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

Id. at 784 (emphasis added).[10] The Court went on to explain that it is "presumed" that the state court adjudicated the claim on the merits "in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784–85. See also *Early* v. *Packer*, 537

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[10] This Court has previously held that where a state court *expressly* says it is ruling on only one prong of the *Strickland* analysis, then no deference is owed with respect to the other prong. *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005). That was not the case in *Harrington*, nor is it what happened here.

U.S. 3, 8 (2002) (recognizing that a state-court decision "does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

Here, the Michigan Court of Appeals rejected Cooper's ineffective-assistance claim on the merits without specifying the *Strickland* prong that dictated that result. Pet. App. 45a ("The record fails to support [Cooper's] contentions that defense counsel's representation was ineffective[.]"). Under *Harrington*, therefore, the Michigan Court of Appeals' decision is entitled to deference on both *Strickland* prongs. There should be no difference between a summary order, as in *Harrington*, and the decision here, which provided some analysis, but did not clearly specify the basis of its ruling.

As for the Michigan trial-court decision, it did provide a prejudice analysis regarding whether Cooper would have ultimately accepted the plea offer. In rejecting Cooper's claim in a post-conviction hearing, the trial court placed its reasoning on the record and noted that Cooper had consistently maintained a claim of self defense, which is inconsistent with a plea of guilty:

> It was Mr. Cooper's belief . . . that at the absolute most[,] if his self-defense claim did not work, that he should only be found guilty of a felonious assault.
>
> * * *
>
> Mr. Cooper was alleging that Miss Mundy [i.e., the victim] had a weapon and so there was

> always the claim of self-defense out there that was being explored by Mr. McClain [i.e., State trial counsel] as a result of the conversations with Mr. Cooper.

Pet. App. 53a, 54a. The Michigan trial court concluded that, although the parties were attempting to resolve the matter with a plea, it was Cooper who wanted to go to trial: "There's a point where a plea becomes unacceptable and people decide to go to trial and that's what I think that happened in this case." Pet. App. 54a.

A fair reading of this decision is that the Michigan trial court rejected the ineffective-assistance claim because Cooper was claiming self defense and did not believe that he should be convicted for any greater offense than a four-year felony, felonious assault. Mich. Comp. Laws § 750.82. And, as the "last reasoned decision" of the state courts, the trial court's ruling is also entitled to deference. *Ylst*, 501 U.S. at 803–04 ("The maxim is that silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. . . . We think that a presumption which gives them no effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play.").

In sum, deference is owed to both the Michigan Court of Appeals and Michigan trial-court decisions.

B. This Court has never held that rejection of a plea based on deficient advice is prejudicial under *Strickland* where the defendant is then convicted at a fair trial.

The State does not contest whether Cooper's trial counsel was deficient. So the only question is whether this deficiency prejudiced Cooper under *Strickland*. The state-court decisions holding that Cooper was not entitled to relief are not an unreasonable application of clearly established Supreme Court precedent. In other words, there was no "extreme malfunction" here. *Harrington*, 131 S. Ct. at 786. Accordingly, reversal is warranted.

The seminal cases examining the right to effective assistance of counsel during the plea process have examined that issue in the circumstance in which the criminal defendant pled guilty. E.g., *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1483–84 (2010) (counsel ineffective for giving incorrect advice regarding deportation to a criminal defendant who then pled guilty); *Hill* v. *Lockhart*, 474 U.S. 52, 60 (1985) (rejecting a claim of ineffective assistance during the plea stage regarding erroneous advice on parole eligibility where there was no evidence that habeas petitioner would not have pled guilty if correctly advised). In *Padilla*, this Court remanded the issue of prejudice and only examined the question of deficient performance. *Padilla*, 130 S. Ct. at 1483–84. In *Hill*, this Court applied the *Strickland* prejudice standard to the plea process, predicated exclusively on the circumstance in which the criminal defendant pled guilty and was convicted as a consequence of the plea. *Hill*, 474 U.S. at 59 ("in order to satisfy the 'prejudice'

requirement, the *defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty* and would have insisted on going to trial.") (emphasis added). This Court did not address in these cases the situation in which a criminal defendant elected to go to trial as a consequence of the legal advice of counsel.

In his brief in opposition, Cooper relied primarily on *Padilla* and *Hill* to support the position that there is prejudice under *Strickland* in the circumstance in which a criminal defendant goes to trial based on deficient advice. Res. Br. in Opp. 12–22. But these cases do not resolve this issue. One of the other cases Cooper cited is *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2005), in which this Court reversed the conviction of a criminal defendant convicted at a fair trial. But *Gonzalez-Lopez* did not address the issue of the effective assistance of counsel and prejudice at the plea stage, but rather the point that a criminal defendant has a right to select his counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 146 ("In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'"). There is no claim here that Cooper was deprived of his counsel of choice.

In response to this open question, the federal circuits and other lower courts have provided a range of answers. Some courts have granted a new trial, see, e.g., *Gordon*, 156 F.3d at 381–82; some required the conveyance of the same offer, see, e.g., *Hoffman* v. *Arave*, 455 F.3d 926, 942–43 (9th Cir. 2006); some

required giving the option of either a new trial or the original offer to the criminal defendant, see, e.g., *Beckham* v. *Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981); and some have rejected the claim altogether because there was no prejudice where there was a fair trial, see, e.g., *Greuber*, 165 P.3d at 1188–91 (Utah 2007). Pet. 14–15 ns. 19–22. This Court's recognition of "diverg[ent]" treatment by the lower courts supports the conclusion that there is no clear guidance from this Court. *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006) ("Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the claim).

In any event, Cooper cannot rely on the lower courts to establish this point, because AEDPA requires that the clearly established law be determined from the precedent of *this Court*. 28 U.S.C. § 2254 ("as determined by the Supreme Court of the United States"). See also *Thayer* v. *Haynes*, 130 S. Ct. 1171, 1175 (2010) ("we hold that no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied"). In fact, this Court's 2007 grant of the petition in *Arave* v. *Hoffman*, 552 U.S. 1008 (2007), to examine the same issue presented, underscores the point that this was an open question for this Court at the time of the Sixth Circuit decision.

In the absence of any controlling authority, the Michigan state-courts' decisions were not objectively unreasonable. AEDPA imposes a "highly deferential standard," *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010), and *Strickland* requires an evaluation of the reliability of the trial, the fairness of which is no longer at issue.

Strickland, 466 U.S. at 685. In this posture, the state-court adjudication was not an "extreme malfunction."

In conclusion, Cooper is unable to prove that his conviction is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]." 28 U.S.C. § 2254(d)(1). Quite the opposite, granting Cooper's claim for relief would be a novel expansion of the Sixth Amendment, creating out of whole cloth a right that this Court has never recognized in the Amendment's 220-year history. Cooper is not entitled to habeas relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APRIL 2011

RESPONDENT'S BRIEF

No. 10-209

IN THE

Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Is a defendant denied his Sixth Amendment right to the effective assistance of counsel where counsel's affirmative misadvice causes the defendant to decline a favorable plea offer, and the defendant is subsequently convicted at trial and sentenced to a substantially longer term of imprisonment?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTRODUCTION

The parties in this case agree that respondent Anthony Cooper received advice from his counsel that was objectively unreasonable. That advice was simple and breathtakingly wrong; namely, that Mr. Cooper could not be convicted of assault with intent to murder because the gunshots he fired struck the fleeing victim only below the waist.

The results of counsel's affirmative misadvice are equally clear on the record. Mr. Cooper relied on the advice, rejected a favorable plea offer he otherwise would have accepted, stood trial, and suffered the very consequence his counsel had assured him was impossible: a conviction for assault with intent to murder. The minimum sentence he actually received was demonstrably greater—by more than 8 and one third years—than the minimum sentence he would have received under the proffered plea. Mr. Cooper thus amply demonstrated, as both the Eastern District of Michigan and the Sixth Circuit properly held, that he was prejudiced by his counsel's affirmative misadvice. The Michigan Court of Appeals' ruling to the contrary was an unreasonable application of this Court's established Sixth Amendment precedents holding that plea bargaining is a critical stage in criminal proceedings and that counsel's bad advice at that stage warrants relief.

That Mr. Cooper had a trial is no cure for his lawyer's bad advice. There should never have been a trial. Had Mr. Cooper received competent advice, he would have pled guilty and received a sentence consistent with the prosecution's plea offer.

Habeas courts have long had broad authority to fashion remedies in cases such as this one. Here, the

district court properly exercised that authority to correct the constitutional error that occurred at the plea stage. Mr. Cooper seeks no windfall or extraordinary benefit. Instead, he seeks to make the *informed* choice that his counsel's affirmative misadvice had taken from him and to accept the same deal that the State had previously and openly offered. Cases involving similar, but less stark, circumstances have resulted in similar remedies. Such a remedy comports with the traditional authority of habeas courts to tailor a proper right for such a grievous constitutional wrong.

STATEMENT OF THE CASE

Incident

Kali Mundy, anxiously awaiting the arrival of a friend, approached a vehicle as it arrived, thinking her friend was inside. It was Mr. Cooper, however, who exited the car. He walked toward her, pulled out a gun and started shooting at her, chasing her and firing as she ran away. Pet. App. 25a-26a. Ms. Mundy was twice hit from behind with bullets that struck her below the waist, and was hospitalized for potentially fatal wounds. Pet. App. 27a.

Mr. Cooper was arrested and charged with assault with intent to murder (AWIM), felon in possession of a firearm, felony firearm, and possession of marijuana. AWIM was the most serious offense, carrying a possible life sentence.[1]

Plea Negotiations

Prior to trial, Mr. Cooper sent the trial court two letters, each indicating his desire to plead guilty. Pet. App. 31a.

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[1] Mich. Comp. Laws § 750.83.

The State's plea offer at the final pretrial conference was for Mr. Cooper to plead guilty to the AWIM and felony firearm charges,[2] with dismissal of the two other charges and the sentencing enhancement.[3] The State offered a minimum sentence range[4] of 51 to 85 months,[5] even though the guidelines called for a minimum sentence range of 81 to 135 months. Counsel rejected the offer because he felt the prosecution could not prove AWIM at trial:

> [A]fter [] the medical report, Your Honor, I believe that the Prosecution does not have the evidence to try to [sic] this case ... [the prosecutor at the pretrial conference] is not trying the case, I would like to discuss this matter with the attorney who has will [sic] make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial. Pet. App. 49a.

---

[2] A conviction for felony firearm mandates a two year sentence to be served consecutively to the sentence for the felony to which it attaches. *See* Mich. Comp. Laws § 750.227b.

[3] All plea negotiations involved the same terms with regard to the charges and sentencing enhancement. Thus only the AWIM charge will be referenced as that was the controlling charge for plea bargaining and appellate purposes.

[4] Michigan uses an indeterminate sentencing system. Michigan's sentencing guidelines provide ranges that encompass the options available to a sentencing judge in determining the court-imposed minimum sentence. The maximum sentence is set by statute, except where, as here, the statutory maximum is "imprisonment for life or any number of years." Mich. Comp. Laws § 750.83.

[5] The sentencing guidelines range applies only to the AWIM charge.

In response, the prosecutor at the hearing noted that there "will be no offer on trial date because that's policy. I withdraw this offer." Pet. App. 50a. At the conclusion of the hearing, counsel stated that, "I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer." Pet. App. 51a.

Prior to jury selection, a different prosecutor extended yet another plea offer on the AWIM count with minimum sentencing guidelines, per her calculation, of 126 to 210 months. Counsel refused that plea offer as well. Pet. App. 29a.

The jury convicted Mr. Cooper as charged. Mr. Cooper is serving a 185 to 360[6] month term of imprisonment for the AWIM conviction.[7]

Post-Conviction Hearing

Mr. Cooper appealed by right and trial counsel testified at the post-conviction hearing.[8] He acknowledged that Mr. Cooper expressed interest in resolving the case with a plea. With respect to rejecting the plea offer to AWIM with an agreed upon minimum sentencing range of 51-85 months, counsel felt that he could receive "a more reasonable offer" later in the process from the prosecutor who would be trying the case. In spite of his expressed desire to

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[6] Mr. Cooper's sentence was subject to enhancement as a second offender. Mich. Comp. Laws § 769.11

[7] Mr. Cooper's sentencing points placed him in the E-IV grid, which resulted in a range for the minimum sentence of 135-281 months. Resp't App. 6a.

[8] Michigan has a unified appellate system. As part of the direct appeal appellate counsel may file a motion in the trial court for a new trial or other relief. *See* Mich. Ct. R. 7.208(B)

obtain a more favorable plea agreement, counsel knew from experience that the offer at trial generally would not improve over a pretrial offer. Pet. App. 31a. However, after his review of the medical records, counsel did not feel the AWIM charge was colorable. Pet. App. 31a.

Despite his belief that the record evidence was legally insufficient to support the AWIM charge, counsel failed to file a motion to quash the bindover on this offense. Such a motion would have challenged the sufficiency of the evidence to support trial on the offense. See Pet. App. 3a-4a.

Mr. Cooper corroborated counsel's account of their plea conversations. Just as he expressed in two letters to the court, Mr. Cooper testified that he intended to plead guilty because he shot Ms. Mundy. Mr. Cooper rejected the offer of a minimum sentence in the range of 51 to 85 months based on the advice of counsel: "My lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist." Pet. App. 31a. Instead, counsel informed Mr. Cooper that he could get a plea for great bodily harm[9] with a guidelines range on the minimum sentence of 18 to 84 months. *Id.*

Prior to trial, counsel never discussed how to defend the case. As Mr. Cooper testified, "We never really got a chance to discuss a strategy." "[I] never knew I was going to trial until the trial started." Resp't App. 19a, 24a.

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[9] Assault with Intent to Commit Great Bodily Harm less than Murder (GBH) has a ten-year statutory maximum penalty compared to AWIM's maximum penalty of life or any term of years.

Counsel never informed Mr. Cooper that a jury might find him guilty of AWIM, and that he could face two to three times the 51 to 85 months offered by the prosecuting attorney. Rather, "[h]e told me that the prosecution couldn't prove his case because the person was shot below the waist and that's not attempted murder. It was [great-bodily] harm and that he was going to get me a plea bargain." Pet. App. 31a (alterations in original). Mr. Cooper would have accepted the 51 to 85 month offer if counsel had explained that a jury could find him guilty of AWIM. Pet. App. 15a-16a.

Trial Court's Ruling

The trial court found that counsel informed Mr. Cooper that a conviction for assault with intent to commit murder "could not" occur given the medical evidence. The trial court concluded that Mr. Cooper and his counsel "were convinced that [conviction of assault with intent to murder] couldn't occur" Pet. App. 15a (alterations in original). The trial court nonetheless ruled against Mr. Cooper stating: "Mr. Cooper made his own choices." Pet. App. 7a.

Michigan Appellate Court Rulings

The Michigan Court of Appeals affirmed. It too rested its decision[10] exclusively on the fact that Mr. Cooper chose not to plead guilty, without regard to whether he made that choice based on his lawyer's erroneous advice. Pet. App. 45a. The court rejected Mr. Cooper's ineffective assistance claim with the statement that "the record shows that defendant

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[10] Mr. Cooper presented three issues on direct appeal, all of which involved ineffective assistance of counsel claims. The issues of counsel's failures at trial were not brought in federal court.

knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. The Michigan Supreme Court denied leave to appeal. Pet. App. 43a.

Federal District Court

Mr. Cooper timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, arguing that the decision of the Michigan Court of Appeals "unreasonably applied clearly established federal precedent" in rejecting his claim of ineffective assistance of counsel by improperly focusing on "the legitimacy of [Mr. Cooper]'s plea decision, [rather than] the validity of counsel's underlying advice." Petition for Writ of Habeas Corpus 18.

The district court granted relief, holding "the Michigan Court of Appeals decision unreasonably applied the standards set forth" by this Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), when it relied on Mr. Cooper's decision to reject the plea, without taking into account that the decision was based on counsel's objectively unreasonable advice. Pet. App. 38a. The court found that counsel had provided constitutionally deficient advice by "rely[ing] on a misapprehension of the law and facts in advising [Mr. Cooper] to reject the plea." Pet. App. 41a.

The court conditionally granted the writ, and found "that the most appropriate remedy is to grant a writ of habeas corpus ordering specific performance of Petitioner's original plea agreement, for a minimum sentence in the range of fifty-one to eighty five months, the plea Petitioner would have accepted if counsel had been competent." Pet. App. 41a.

Sixth Circuit

The Sixth Circuit unanimously affirmed the district court's conditional grant of relief. Pet. App. 1a. It agreed that counsel "informed [Mr. Cooper] of an incorrect legal rule . . . in advising [Mr. Cooper] not to accept the state's plea offer," and that "such erroneous advice . . . is obviously deficient performance." Pet. App. 14a. It further agreed that counsel's erroneous advice prejudiced Mr. Cooper, who "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 19a.

Accordingly, the Sixth Circuit found that the Michigan Court of Appeals had unreasonably applied this Court's precedent. It explained that the Michigan Court of Appeals had "failed to appreciate the nature of [Mr. Cooper]'s claim. Rather than addressing [Mr. Cooper]'s argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different—and considerably weaker—claims of ineffective assistance of counsel [at trial]." Pet. App. 10a. As a consequence, the court of appeals held that "[e]ven full deference under [the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C § 2254 (2011) (AEDPA)] cannot salvage the state court's decision." Pet. App. 11a.

The court of appeals also affirmed the district court's choice of remedy, holding that it was within the trial court's broad discretion in forming a habeas remedy. Pet. App. 22a. The court of appeals also rejected the State's argument that the district court's choice of remedy was inappropriate under AEDPA, holding that "[t]he absence of clearly established law

by the Supreme Court is not relevant when fashioning a habeas remedy." Pet. App. 20a.

SUMMARY OF ARGUMENT

Criminal defendants are entitled to effective assistance of counsel during all critical stages of a criminal prosecution, including plea negotiations. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480-81 (2010). While the protections embodied in the Sixth Amendment undoubtedly guarantee a fair trial, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). To conclude otherwise would contravene the central principles of this Court's long-established Sixth Amendment jurisprudence.

Where counsel offers affirmative misadvice regarding the applicable law during plea negotiations, his performance is objectively unreasonable. *Padilla*, 130 S. Ct. at 1483. Petitioner concedes that counsel's performance is constitutionally deficient in this case.

In order to make out a cognizable Sixth Amendment claim, a defendant must also show that he was prejudiced by his counsel's defective performance. A defendant satisfies the prejudice requirement by showing a "reasonable probability" that but for his counsel's constitutionally defective advice, the outcome of the relevant proceeding would have been different. *Strickland*, 466 U.S. at 694; *Hill*, 474 U.S. at 59.

Here, Mr. Cooper's counsel provided affirmative misadvice with regard to a specific plea offer, depriving Mr. Cooper of his right to intelligently consider an offered plea deal. On counsel's advice, he declined this favorable plea offer, and proceeded to

trial, where he was convicted and sentenced to a much more severe term of imprisonment. Mr. Cooper has demonstrated prejudice under *Strickland* because he has shown more than a reasonable probability that but for his counsel's gross errors, he would have accepted the offered plea bargain, entered a guilty plea before the court, and been sentenced pursuant to the negotiated plea deal.

Where, as here, counsel provides faulty advice that denies a defendant the right to knowingly consider an offered plea deal, the constitutional injury occurs during the plea bargaining stage. Counsel's objectively incorrect advice denied Mr. Cooper the right to make an informed choice regarding the State's offered plea bargain. His subsequent trial did not restore this lost right.

The Michigan state courts' opinions to the contrary are incompatible with this Court's clearly established test for ineffective assistance claims under *Strickland*. Neither the trial court nor the Michigan Court of Appeals considered Mr. Cooper's claim under *Strickland*'s two-prong test. Accordingly, the opinions are not entitled to deference under AEDPA. Even if full deference is given under AEDPA, the Michigan courts' opinions are unreasonable applications of *Strickland* under 28 U.S.C. § 2254(d)(1) because the Michigan courts unreasonably failed to consider counsel's admittedly constitutionally defective conduct and its prejudice to Mr. Cooper's ability to knowingly consider the offered plea.

As Mr. Cooper has shown a Sixth Amendment violation, and that the state courts' opinions to the contrary are unreasonable, he is entitled to habeas relief. In this case, the district court's choice of remedy—a writ conditioning release on the

reinstatement of the plea offer—is well within the broad discretion historically committed to habeas courts to fashion remedies when confronted with constitutional violations and a common form of relief ordered by habeas and state courts in similar circumstances. Here, the conditional writ is the most rational remedy because it is narrowly tailored to the injury Mr. Cooper suffered and does not unnecessarily infringe upon competing state interests.

ARGUMENT

I. TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED MR. COOPER DURING A CRITICAL STAGE.

Counsel's objectively unreasonable advice was that Mr. Cooper should not plead to the assault with intent to murder charge because he had only shot his victim below the waist. Michigan law, however, is patently clear that the victim need not suffer any injury at all. See *infra* p. 13. By any measure, and certainly any objective one, counsel's affirmative misadvice rendered his performance deficient. See *Strickland*, 466 U.S. at 688.

The record further demonstrates that, but for his counsel's erroneous advice, Mr. Cooper would have accepted the offered plea deal and avoided the lengthier sentence that followed trial. Counsel's deficient performance therefore prejudiced Mr. Cooper, and this prejudice could not be cured by the subsequent proceedings. Because the state courts' decisions to the contrary were unreasonable under the clearly established precedents of *Strickland* and *Hill*, Mr. Cooper is entitled to relief.

A. Trial Counsel's Affirmative Misadvice with Respect to an Offered Plea Deal Is Deficient Performance.

1. Plea Bargaining Is a Critical Stage in Criminal Prosecutions.

Affirmative misadvice in the course of plea bargaining necessarily corrupts the remaining criminal processes. As here, such advice can result in a trial and a sentence that, for good reason, is very likely higher than what a prosecutor may have agreed to or what a judge may have meted out had the authorities and the court not been put to the burden of a trial. Conversely, an overlooked defense (or one that is not investigated) can lead to a plea bargain and a sentence that is unwarranted given the posture of the case. Thus, "*the negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486 (citing *Hill*, 474 U.S. at 57; *McMann* v. *Richardson*, 397 U.S. 759, 770-71 (1970)) (emphasis added).

The State's odd proposal, that it is only the act of "*acceptance* of a plea offer that is a 'critical stage,'" Pet. Br. 12, n.3 (emphasis in original), is not only fundamentally incompatible with *Padilla*, but also contrary to this Court's longstanding precedent that a defendant is entitled to his counsel's effective assistance *in the course of* deciding whether to plead guilty. See *McMann*, 397 U.S. at 770. Competent counsel is necessary for any defendant to determine what, in fact, he or she might be guilty of in the first instance, as well as what the prosecutor may be able to prove. Such assessments are at the core of the plea bargaining process. See *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011) (noting that "plea bargains are the result of complex negotiations suffused with

uncertainty," during which attorneys must "make careful strategic choices in balancing opportunities and risks").

2. The Medical Evidence in this Case Did Not Negate the Intent Element of the Assault Charge.

Even if the State had not conceded that Mr. Cooper's counsel rendered patently erroneous advice, Pet. Br. 9, n.2; *Id.* at 31; Pet. Cert. Reply at 14, n. 34, there is no doubt that failing to understand the basic elements of the charged crime fits comfortably within the hornbook definition of ineffective assistance. The applicable standard for judging an attorney's performance is identical in the plea and trial contexts. *Hill*, 474 U.S. at 57-58; see also *Padilla*, 130 S. Ct. at 1482. "Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused." *Premo*, 131 S. Ct. at 742. There is no plausible interpretation of this objective standard that would countenance the affirmative misadvice offered by Mr. Cooper's counsel in this case.

During the final pretrial hearing, Mr. Cooper's counsel stated on the record that he was advising Mr. Cooper to reject the offered deal because he believed there was no factual basis for the AWIM charge. See *supra* p. 3; Pet. App. 49a. It is undisputed, however, that under Michigan law, a victim need not suffer any injury at all to satisfy the intent element of AWIM. See *People* v. *Brown*, 407 N.W.2d 21, 23 (Mich. Ct. App. 1987); *People* v. *Cochran*, 399 N.W.2d 44, 45 (Mich. Ct. App. 1986). As first-year law students learn, a criminal assault, just like the tort, does not require that a "battery" take place at all. Wayne R. Lafave, Criminal Law § 16.1 (a) (4th ed.

2003); *I de S et ux* v. *W de S*, Y.B. 22 Edw. iii, f. 99, pl. 60 (1348). Instead, the question is whether the victim reasonably feared for his or her life and whether the perpetrator intended to cause that level of fear. *Id.* Where a deadly weapon is used and where it is fired directly at the victim, whether the victim was hit at all, much less where the victim was actually struck, has little bearing on these elements. See *People* v. *Harrington*, 487 N.W.2d 479, 483 (Mich. Ct. App. 1992).

Thus, counsel's affirmative misadvice that Mr. Cooper could not be convicted of this offense, causing Mr. Cooper to decline the offer, constitutes constitutionally defective performance. See *Padilla*, 130 S. Ct. at 1483; see also *id.* at 1492 (Alito, J., concurring) ("[A]ffirmative misadvice [during the plea bargaining process] may constitute ineffective assistance").

The State perplexingly reads the record as demonstrating "the ease by which criminal defendants and habeas petitioners may second-guess the pre-conviction plea advice that trial counsel provided," Pet. Br. 9, n. 2, as if counsel had exhibited merely bad judgment. But here, counsel did not suggest that Mr. Cooper decline the plea offer out of strategic considerations, nor merely fail to advise Mr. Cooper regarding the likelihood of his conviction following trial. Compare *Padilla*, 130 S. Ct. at 1492-94 (Alito, J., concurring) (emphasizing the deleterious effects of affirmative misadvice during plea bargaining) with *Premo*, 131 S. Ct. at 741 (cautioning against overly broad review of strategic decisions made by counsel during plea stage); see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 385 (1986) (ignorance of the law is inexcusable constitutionally deficient performance). Here, counsel provided

affirmative misadvice regarding the *elements* of the charged crime, and the record reflects numerous instances in which counsel himself revealed both that he misunderstood the law and that his advice to Mr. Cooper to decline the plea offer was based upon that misunderstanding. See Pet. App. 30a-31a, 49a-50a; Resp't App. 10a-12a. The only reasonable reading of this record is that Mr. Cooper's declination of the plea offer was solely the result of counsel's affirmative misadvice.

The State's suggestion that remedying constitutional violations such as this one might have negative effects on the ability of parties to negotiate and enter into plea bargains is without merit. See Pet. Br. 17. Unlike a situation where a defendant is "second guessing" his counsel's strategic decisions or inaction, as in the case on which the State relies, *Premo*, 131 S. Ct. at 738, 742-43, creating incentives for counsel to understand and communicate the elements of a crime with which his client is charged will increase the effectiveness of the plea bargaining process. Without competent advice on such matters "a defendant would be at a disadvantage when pitted . . . against the legally trained agents of the state." *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting); *id.* (Counsel is required to advise his client regarding "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction."). It is the insulation of claims such as Mr. Cooper's from review advocated by the State and the Solicitor General, see *infra* pp. 22-23, 43, that would have such detrimental effects on the plea bargaining system. See *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and

seems to call the fairness and integrity of the criminal proceeding itself into question."). As discussed below, moreover, see *infra* p. 43, the powerful institutional interests at stake in preserving the plea bargaining process fatally undermine the Solicitor General's suggestion, see S.G. Br. 29, that the State would radically modify its plea process to avoid the de minimus risk of a successful habeas claim.

B. Trial Counsel's Affirmative Misadvice Caused Immediate Prejudice to Mr. Cooper That Was Not Cured by His Subsequent Trial.

If not for counsel's inexplicable advice that the prosecution's AWIM charge lacked sufficient factual support, Mr. Cooper would have accepted the plea offer, entered a guilty plea, and been sentenced in accordance with the plea bargain. Mr. Cooper has more than amply shown that he was prejudiced by his counsel's concededly defective performance.

1. Subsequent Proceedings Did Not Cure Mr. Cooper's Lost Opportunity.

In cases such as this, *Strickland*'s prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected *the outcome of the plea process*." *Hill*, 474 U.S. at 59 (emphasis added). See also *Padilla*, 130 S. Ct. at 1480-81. Accordingly, the relevant inquiry is whether counsel's admittedly deficient performance affected the outcome of the plea process—*i.e.*, whether but for counsel's flawed advice, Mr. Cooper would have accepted the state's offer and chosen to enter a guilty plea.

The State and the Solicitor General devote substantial portions of their briefs to the argument that Mr. Cooper cannot show prejudice pursuant to

Padilla and *Hill* because his conviction and sentence followed a trial, not a guilty plea. See Pet. Br. 13-23; S.G. Br. 9-24. They rely entirely upon a red herring: there should not, and would not have been a trial in this case at all had Mr. Cooper received minimally competent advice.

The State and the Solicitor General would ask this Court to carve out an exception to *Padilla* and *Hill* that has no basis in the law.[11] In their view, it matters not whether counsel renders blatantly defective assistance at the plea bargaining stage, so long as counsel is adequately competent during the trial. See Pet. Br. 21; S.G. Br. 12, 17. But, in *Padilla*, this Court held that "*[b]efore deciding whether to plead guilty*, a defendant is entitled to the 'effective assistance of counsel.'" 130 S. Ct. at 1480-81 (emphasis added). While the State and the Solicitor General seize upon this Court's statement that "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," they ignore this Court's admonition that "it does not follow that [Sixth Amendment] rights can be disregarded so long as the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145. The position of the State and the Solicitor General is also squarely at odds with this Court's recent reaffirmation that "[i]f a 'particular guarantee'

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[11] The State's reliance on dictum in *Breard* v. *Greene*, 523 U.S. 371 (1998), for the proposition that this Court would generally hold that a final judgment should not be overturned without some showing that the alleged violation had an effect on the trial, is unconvincing. That case did not involve ineffective assistance of counsel, or any other type of Sixth Amendment claim. Moreover, the *Breard* Court based its holding on procedural grounds, making the language that petitioner cites non-precedential dictum. *See Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J.).

of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation 'complete.'" *Bullcoming* v. *New Mexico*, No. 09-10876, 2011 WL 2472799, at *9 (U.S. June 23, 2011) (quoting *Gonzalez-Lopez*, 548 U.S. at 146).[12]

As "plea bargains are the result of complex negotiations suffused with uncertainty," the competent advice of an attorney "in balancing opportunities and risks" is necessary to protect a defendant's right to make an informed choice about whether or not to plead guilty.[13] *Premo*, 131 S. Ct. at 741. For purposes of the right to the effective assistance of counsel, a defendant who, after considering an offered plea, decides to accept the offer and plead guilty is no different than a defendant who considers the same offer but does not plead guilty;

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[12] Nor does the position of the State and the Solicitor General square with other authority from this Court that has consistently held that the right to counsel attaches at all critical pretrial stages. *See Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961); *Massiah* v. *United States*, 377 U.S. 201, 205-06 (1964); *United States* v. *Wade*, 388 U.S. 218, 236-38 (1967); *see also Powell* v. *Alabama*, 287 U.S. 45, 57 (1932) ("[D]uring perhaps the most critical period of the proceedings against . . . defendants ... from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, . . . [criminal defendants are] as much entitled to [the aid of counsel] during that period as at the trial itself.").

[13] This Court has recognized the importance of a criminal defendant's right to make informed choices in other contexts. In *Miranda* v. *Arizona*, for example, the Court emphasized that the procedural safeguards required by the Fifth Amendment were necessary in light of defendants being "thrust into an unfamiliar atmosphere," to ensure that defendants' statements "were truly the product of free choice." 384 U.S. 436, 457 (1966).

both are equally in need of competent counsel when making the crucial decision of whether or not accept the offered plea deal. Contra Pet. Br. 10-11, 12; S.G. Br. 17-20.

2. The State and Solicitor General's Position is Contrary to the Unanimous Consensus of the Federal Courts of Appeals.

The State and the Solicitor General's arguments are also contrary to the universal consensus of the federal appellate courts. For the reasons outlined above, all of the federal courts of appeals agree with the Sixth Circuit that a defendant can show prejudice under *Strickland* where his counsel's deficient performance causes him to reject a plea bargain, even if he is subsequently convicted at trial.[14] *United States* v. *Rodriguez Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) (per curiam) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on [S]ixth [A]mendment grounds if counsel's performance during plea bargaining fell below 'the range of competence demanded of attorneys in criminal cases'") (quoting *Strickland*, 466 U.S. at 687); *United States* v. *Gordon*, 156 F.3d 376, 380-81 (2d Cir. 1998) (per curiam); *United States* v. *Day*, 969 F.2d 39, 43-45 (3d Cir. 1992); *United States* v. *Brannon*, 48 F. App'x 51, 53 (4th Cir. 2002) (per curiam); *Beckham* v. *Wainwright*, 639 F.2d 262,

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[14] In light of this unanimous consensus of the federal courts of appeals, and the fact that such precedents are longstanding, dating back nearly thirty years, *see, e.g.*, *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435 (3d Cir. 1982), the State's argument that affirming the Sixth Circuit in this case would cause a flood of new ineffective assistance claims, *see* Pet. Br. 20, is unavailing. *See infra* pp. 40-41.

267 (5th Cir. 1981); *Turner* v. *Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reinstated and reaffirmed*, 940 F.2d 1000, 1001 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Julian* v. *Bartley*, 495 F.3d 487, 498-500 (7th Cir. 2007); *Wanatee* v. *Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (it was "an objectively unreasonable application of *Strickland*'s prejudice prong" for the state court to "h[o]ld that [defendant] could not show that he had been prejudiced by any inadequate advice at the plea bargaining stage because he ultimately received a fair trial"); *Nunes* v. *Miller*, 350 F.3d 1045, 1052 (9th Cir. 2003); *Williams* v. *Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 3385 (2010); *Oliver* v. *United States*, 292 F. App'x 886, 887 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2023 (2009); *United States* v. *Gaviria*, 116 F.3d 1498, 1512-13 (D.C. Cir. 1997) (per curiam).[15]

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[15] The majority of state courts to consider the issue have adopted a similar rule. *See, e.g., In re Pers. Restraint of McCready*, 996 P.2d 658 (Wash. Ct. App. 2000) (finding Sixth Amendment violation where counsel's misadvice regarding maximum and minimum sentences deprived defendant of ability to make informed choice regarding plea offer); *State* v. *Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997) (defendant entitled to relief where he rejected plea offer based on counsel's incorrect representations that defendant had viable defenses at trial); *People* v. *Curry*, 687 N.E.2d 877, 882 (Ill. 1997) ("[I]t has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial."); *Williams* v. *State*, 605 A.2d 103 (Md. 1992) (same); *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) ("[W]e conclude . . . that when a defendant demonstrates that ineffective representation at the pretrial stage of a criminal proceeding caused him or her to proceed to trial rather than to accept an offer of a plea bargain . . . the defendant has been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment . . . even if

3. Common Sense Supports this Universal Consensus.

A decision based upon erroneous advice in any number of contexts, even beyond criminal proceedings, will irretrievably affect all of the proceedings that follow. Thus, it does not matter that a surgeon performs flawless surgery if patient consent was obtained based on a wholly erroneous diagnosis—that the event occurred at all is malpractice and harmful. Nor would it matter if a contractor perfectly constructed a building on property that the contractor improperly surveyed. And in the context of a criminal proceedings, it would be equally prejudicial—and much like this case—for counsel to advise going to trial based upon erroneous information as to the sentence that would result.[16]

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defendant thereafter receives a fair trial."); *Larson* v. *State*, 766 P.2d 261, 262-63 (Nev. 1988); *Commonwealth* v. *Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *People* v. *Alexander*, 136 Misc. 2d 573, 518 N.Y.S.2d 872, 880 (N.Y. Sup. Ct. 1987); *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex. Crim. App. 1987); *Tucker* v. *Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *Lloyd* v. *State*, 373 S.E.2d 1, 3 (Ga. 1988); *State* v. *Simmons*, 309 S.E.2d 493, 498 (N.C. Ct. App. 1983); *Lyles* v. *State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

[16] In fact, Mr. Cooper faced just such a situation as the result of his counsel's incompetence. The maximum statutory penalty for AWIM is imprisonment for life or any number of years. Mich. Comp. Laws § 750.83. In contrast, the maximum statutory sentence Mr. Cooper faced for the lesser included offense of Assault with Intent to Do Great Bodily Harm Less than Murder—the highest offense that counsel erroneously thought could possibly be proven given the evidence—was fifteen years. *See* Mich. Comp. Laws §§ 750.84, 769.10. Given that the maximum minimum sentence permitted under Michigan law is two-thirds of the statutory maximum, *see* Mich. Comp. Laws § 769.34(2)(b), counsel and, as a result, Mr. Cooper went to trial believing that they could not do much worse than

That the trial went off without a hitch makes no difference to a defendant who agreed to suffer it thinking throughout that the worst he could do was better than the plea offer. See *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting) (competent advice is required with regard to "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction") (internal quotation marks omitted); see also, *e.g.*, *Julian*, 495 F.3d 487, 496-500 (defendant was prejudiced by loss of guilty plea where counsel unreasonably misunderstood this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and incorrectly advised client that his maximum sentence would be thirty rather than sixty years of imprisonment).[17]

Under the State and the Solicitor General's mistaken reading of this Court's precedents, any constitutionally defective performance—no matter how grievous—during plea bargaining would be entirely shielded from review where the defendant proceeded to trial. This position is illogical and

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the high end of the minimum sentence range that had been offered. It therefore also defies common sense to hold, as the Michigan Court of Appeals did, that Mr. Cooper made his own choice not to plead guilty when his attorney assured him that he could not be convicted of the life offense.

[17] *See also Gordon*, 156 F.3d at 377-81 (defendant was prejudiced where he rejected plea offer based on counsel's representation that his maximum sentence exposure was 120 months when in reality he faced a maximum sentence under the guidelines of 327 months); *Day*, 969 F.2d at 43-45 (defendant may show prejudice where counsel's grossly incorrect advice regarding actual sentencing exposure—which was more than double the length of imprisonment that counsel represented—likely affected his decision regarding whether or not to accept plea offer).

would foreclose relief to a defendant whose counsel—based on a misunderstanding of state law—assured him that he could not receive the death penalty for his crime and advised him to decline a plea offer to a crime that had a maximum sentence of life imprisonment, resulting in the defendant proceeding to trial, where he was convicted and sentenced to death in accordance with the law. Surely such grossly incorrect advice by counsel, and such a disastrous result for the defendant, should be remediable.

4. Mr. Cooper Has Amply Shown a Reasonable Probability That But For His Trial Counsel's Deficient Performance He Would Have Accepted the Plea Offer.

Contrary to the State's arguments, Pet. Br. 15-17, 20, the Sixth Circuit—and every other court of appeals to consider the issue—has not applied a "watered down" "best-outcome" version of the *Strickland* prejudice standard. To the contrary, and unlike the Michigan courts that considered Mr. Cooper's claim, the Sixth Circuit and others[18] have rigorously applied the well-established two-part test, made applicable in clear and plain terms to the plea bargaining process in *Hill*, and which this Court very recently reaffirmed in the habeas context[19]: namely,

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[18] *See, e.g., Day*, 969 F.2d at 44-45 ("Even if Day received substandard assistance from counsel, to justify relief he must prove sufficient prejudice."); *Turner*, 858 F.2d at 1206 ("[A] Sixth Amendment claim of ineffective assistance is not constitutionally cognizable unless it can be shown that the attorney's conduct was both incompetent and prejudicial.").

[19] In *Harrington* v. *Richter*, the Court reaffirmed that:

whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694—*i.e.*, that the outcome of the plea process would have been Mr. Cooper's acceptance of the State's offered plea to a minimum sentence range of 51 to 85 months.

Mr. Cooper has more than made the required showing. Mr. Cooper and his counsel repeatedly stated on the record—during two separate pretrial hearings as well as the post-conviction hearing—that Mr. Cooper was willing to admit his guilt and had always intended to enter a guilty plea. Pet. App. 49a-50a; Resp't App. 14a. It is plain from the record that the only reason that Mr. Cooper did not accept the offered plea deal is because of his counsel's indefensible advice that the prosecution's AWIM charge was unfounded. Pet. App. 49a; Resp't App. 15a-16a, 17a. Mr. Cooper need not rely upon his own testimony that his counsel's advice caused the loss of the plea deal because his counsel affirmatively stated—both before and after trial—that he had advised Mr. Cooper to decline the plea bargain as a result of his defective understanding of the law. See Resp't App. 8a-9a. Moreover, contemporaneous

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"[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is *reasonably likely* the result would have been different. This does not require showing that counsel's actions more likely than not altered the outcome. . . ." 131 S. Ct. 770, 791-92 (2011) (internal quotation marks and citations omitted) (emphasis added).

evidence confirms Mr. Cooper's intent to plead guilty and avoid trial.[20]

The stark difference between the minimum sentence that Mr. Cooper was offered in the plea deal—a range of 51 to 85 months—and the minimum sentence he ultimately received following trial—185 months—is further evidence that Mr. Cooper would have accepted this opportunity for a reduced sentence but for his counsel's ineptitude. It is more than "reasonably probable" that Mr. Cooper would have accepted the offered plea if he had been aware that the minimum sentence he faced following trial was nearly ten years longer than the minimum sentence range offered. See, *e.g.*, *Day*, 969 F.2d at 45 ("[W]e do not find it at all implausible that a young man would think twice before risking over 3800 extra days in jail just to gain the chance of acquittal of a crime that he knew that he had committed."). Instead, Mr. Cooper believed his counsel's assurance that he would somehow get a different, and better, deal because the AWIM charge was legally unsupportable; the only reasonable inference was that proceeding to trial carried no risk.

5. No Greater Showing Is Required to Entitle Mr. Cooper to Relief.

It is immaterial to the prejudice inquiry that prosecutors have discretion to choose whether or not

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[20] Prior to trial, Mr. Cooper sent two letters to the trial judge indicating that he wanted to plead guilty to the lesser-included offense of felonious assault. Mr. Cooper's request in the letters that the Court allow him to plead guilty to Felonious Assault, and not to Assault with Intent to Do Great Bodily Harm, further demonstrates his misapprehension of his ability to be convicted of the crimes charged following his counsel's affirmative misadvice.

to enter into plea negotiations. In this case, the prosecutor actually offered Mr. Cooper a favorable plea deal that he would have accepted but for his counsel's affirmative misadvice. Contrary to the Solicitor General's contentions, Mr. Cooper is not required to show that the prosecutor would not have withdrawn the plea offer or that the trial court would have accepted the guilty plea and imposed the negotiated sentence. See S.G. Br. 21-22.

In *Strickland*, this Court held that a defendant must show only that there is a "reasonable probability" that but for counsel's deficient performance, the outcome would have been different, specifically rejecting the more demanding standard that the government advocated in that case. Even allowing some theoretical *possibility* that the prosecutor or judge may have later withdrawn or rejected the plea deal, Mr. Cooper has more than made the requisite showing that there is a "reasonable probability" that, if not for his counsel's grossly unreasonable advice, the proceeding would have resulted in Mr. Cooper's accepting the initial plea deal.

Even if Mr. Cooper were required to demonstrate more than a "reasonable probability" that the outcome of his criminal proceedings would have been different, he can do so here. First, the transcript of the pretrial hearing shows what the plea offer was (the prosecutor deliberately put that on the record) and that it was open until counsel rejected it on the ground that the medical evidence was insufficient to sustain the charge. Pet. App. 49a. Only then did the prosecutor withdraw the offer.[21] *Id.* Second, the

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[21] In Michigan, as a general matter, once a defendant accepts a plea offer, a prosecutor only withdraws the offer (before

Solicitor General has provided no factual basis to support an inference that pleas like the one offered to Mr. Cooper are regularly rejected. Finally, while it is true that Michigan trial court judges have the discretion to sentence outside the minimum range, this is rarely done and only under circumstances that also are not present here. Accordingly, there is no factual support for the Solicitor General's speculation that the prosecutor might have rescinded the plea offer, that the trial court might have rejected it, or that the trial court might have sentenced Mr. Cooper to anything other than a sentence within the agreed upon minimum range.

Nor is the State correct in arguing that this Court's opinion in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993) "refined" the *Strickland* standard. See Pet. Br. 12. Contrary to the State's position, this Court has repeatedly stated that *Fretwell* was an exceptional case and that *Strickland* remains the rule. *Williams*, 529 U.S. at 391 ("The [lower court] erred in holding that our decision in *Lockhart* v. *Fretwell* modified or in some way supplanted the rule set down in *Strickland*."); *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (holding that the lower court "was incorrect to rely on *Lockhart* to deny relief" based on its mistaken belief pursuant to *Lockhart* that "the

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submission to the trial court) if the offer was originally unauthorized in some way. *See, e.g.*, *People* v. *Heiler*, 79 Mich. App. 714, 716 (1977) (stating that the plea was withdrawn "because the bargain was contrary to the prosecutor's charging policy"). Similarly, under federal law, "plea bargains are like contracts," *see Puckett* v. *United States*, 129 S. Ct. 1423, 1430 (2009) (citing *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984)), and "when a defendant agrees to a plea bargain, the Government takes on certain obligations." *Puckett*, 129 S. Ct. at 1430.

sentence increase does not meet some baseline standard of prejudice").

Fretwell and *Nix* v. *Whiteside*, 475 U.S. 157 (1986), the two cases upon which the State and the Solicitor General rely heavily, involved "situations in which it would be *unjust* to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Williams*, 529 U.S. at 391-92 (emphasis added). In *Nix*, for example, the Court held that even though a defendant's false testimony might have persuaded the jury to acquit him, counsel's interference with his intended perjury did not create cognizable prejudice under *Strickland*. 475 U.S. at 175-76. Similarly, in *Fretwell*, this Court concluded that, even though a different outcome was likely if counsel had been aware of a legal rule applicable at the time of the defendant's sentencing, granting relief would constitute a windfall to *Fretwell* because that legal rule had since been overruled. 506 U.S. at 371. Accordingly, in both *Fretwell* and *Nix*, wholly separate legal considerations—perjury and repeal—weighed against granting relief. Mr. Cooper's case does "not implicate the unusual circumstances present in cases like [*Fretwell*] or *Nix*," and therefore, the lower court's "emphasis on outcome was entirely appropriate." *Williams*, 529 U.S. at 415 (O'Connor, J.).

The State and the Solicitor General's argument that Mr. Cooper cannot show prejudice because he has no constitutional right to a plea bargain, and therefore has not been deprived of a substantive or procedural right to which he is entitled, is similarly unavailing. See Pet. Br. 21; S.G. Br. 19-20. While it is true that Mr. Cooper had no constitutional guarantee that a prosecutor would initiate plea negotiations, see *Weatherford* v. *Bursey*, 429 U.S. 545,

561 (1977), that inquiry is irrelevant in this case where a specific and favorable plea bargain had been offered and was open at the time counsel rendered his constitutionally defective advice. See Pet. App. 48a-50a (offer remained open at the pretrial hearing and was withdrawn only after counsel rejected it based on his mistaken belief that there was insufficient evidence to support the AWIM charge). See also *Williams*, 571 F.3d at 1091 ("[W]e are not dealing with the government's discretion to make or withdraw a plea offer. Rather we are dealing with an offer that was rejected because of counsel's ineffective assistance, with disastrous results for [the defendant]. In the end, this ineffective assistance and the resulting prejudice is attributable to the State.").

An affirmance would not "reward" Mr. Cooper with some benefit to which he is not legally entitled, as was true in *Fretwell* and *Nix*. The prosecutor offered Mr. Cooper a plea that was proper, and pursuant to which he would have been convicted and sentenced if not for his counsel's affirmative misadvice. There is no dispute that the initial offer was open and that its rejection was the result of counsel's incompetence. The record amply reflects that stark fact. Pet. App. 49a-51a. Because of that affirmative misadvice, Mr. Cooper is now serving a much higher sentence than that offered in the plea bargain. Mr. Cooper has demonstrated that he suffered prejudice, and that this prejudice was not cured by his subsequent trial. *Cf. Glover*, 531 U.S. at 203 (2001) (holding that a defendant suffered prejudice under *Strickland* where, following a fair trial, his counsel provided ineffective assistance during the sentencing phase, resulting in an increase in the jail time he would serve).

C. Neither of the State Court Opinions Is Entitled to Deference under AEDPA Because the Case Was Decided Using the Incorrect Test.

Contrary to the State's assertions, Pet. Br. 27, under any possible reading, the state courts decided Mr. Cooper's claim using the wrong legal test. The Michigan Court of Appeals decided Mr. Cooper's ineffective assistance claim using a simulacrum of the constitutional standard for the validity of a guilty plea[22] rather than the clearly established two-part *Strickland* test. After restating Mr. Cooper's claim, that court summarily concluded that Mr. Cooper "knowingly and intelligently rejected the plea offer." Pet. App. 45a. Even if "knowing and intelligent" were relevant to the inquiry in this case, this Court has clearly established that "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56.

Although *Harrington* v. *Richter* made clear that federal habeas courts must presume that state courts have adjudicated a petitioner's claims on the merits even when faced with an ambiguous or summary opinion, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct at 785 (citing *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803-04 (1991). If a claim has been adjudicated on the merits

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[22] *See North Carolina* v. *Alford*, 400 U.S. 25, 30 (1970) (the "standard was and remains whether the plea represents a voluntary and intelligent choice").

in a state court, then it must be assessed under the deferential standards set forth in 28 U.S.C. § 2254(d)(1). Because it is manifest that the state courts disposed of Mr. Cooper's claims using the incorrect legal test, their opinions are not entitled to heightened deference under AEDPA. *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1410 (2011) (citing *Williams*, 529 U.S. at 395-97). Furthermore, even if it could be argued that the opinion should be analyzed under § 2254(d)(1), the district court properly concluded that the state court opinion relied on an unreasonable application of clearly established law.

The precise boundaries of the "range of competence" are susceptible to varying interpretations, but affirmative misadvice as to an element of the charged crime is a mistake so basic that no reasonable jurist could disagree that counsel's performance "betray[ed] a startling ignorance of the law,"[23] *Kimmelman*, 477 U.S. at 385, and the State concedes as much. Pet. Br. 9 n.2. Counsel assured Mr. Cooper that he could not be convicted of assault with intent to murder, when in fact such a result was a near certainty in light of the complete absence of any viable defense. His affirmative misadvice was recorded in open court and repeated in his testimony at the post-conviction proceedings.

Even if it were appropriate to look beyond the "last reasoned opinion on the claim," *Ylst*, 501 U.S. at 803, the trial court also based its decision on erroneous application of the deficient performance element. The State points to an excerpt from the post-

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[23] It is well-settled that even a single isolated error may constitute deficient performance under *Strickland*. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

conviction hearing transcript in which the trial judge states that counsel may have been considering a self-defense argument at trial. Pet. Br. 29. But that claim was wholly unsupported by the facts, disavowed by counsel himself and never in fact raised at trial, included in the jury instructions or even proposed by the defense as a jury instruction.

Aside from the obvious difficulties that shooting a fleeing, unarmed victim in the back pose to a claim of self-defense, no rational finder-of-fact could conclude from the record before the trial court that Mr. Cooper had a self-defense argument informed by competent counsel. The letters from Mr. Cooper to the trial judge—who relied upon them extensively in the post-conviction hearing—support only two reasonable conclusions: Mr. Cooper wanted to plead guilty and he lacked a basic understanding of his legal options. There is no evidence that supports a contrary conclusion.

Further, at sentencing, Mr. Cooper denied making a statement that he had shot the victim to protect himself and his friends. Resp't App. 2a-3a. At the post-conviction proceeding, Mr. Cooper testified that his counsel never discussed the case with him, Resp't App. 20a-21a, and was unresponsive to Mr. Cooper's letters, Resp't App. 21a-22a. In the same proceedings, counsel reaffirmed his patently incorrect understanding of the charges and admitted to misadvising his client. Resp't App. 10a-11a.

The trial court's post-hoc rationale for denying Mr. Cooper's claim, in contrast, lacks any support in the record, and the court's own reasoning admits as much. The court acknowledged that "it's obvious that Mr. Cooper and [counsel] didn't believe that the facts as presented . . . would support a finding of assault with the intent to murder. Both were convinced that

that couldn't occur." Pet. App. 53a. The trial court concluded that the decision to decline the offer "might have been based on the representations of [counsel] and on hindsight sometimes they would say . . . that was an out there kind of claim." Pet. App. 53a-54a. In spite of these conclusions, the court puzzlingly concluded that Mr. Cooper "made his own choices." Pet. App. 54a.

Under these facts, all of which are in the record, Mr. Cooper's decision to decline the offer could not have been "knowing and intelligent." The state court incorrectly applied its own inapposite test. Having conceded that Mr. Cooper's counsel was deficient, the State implausibly contends that both the Michigan Court of Appeals and the trial court opinions could conceivably be read as resting on the prejudice element of the *Strickland* test. Pet. Br. 27-28. But both state courts focused solely on whether Mr. Cooper's choice to reject the plea offer was knowing and intelligent, which is dependant on receiving at least minimally competent advice from counsel. Therefore, the district court appropriately considered Mr. Cooper's claim *de novo*. *Porter* v. *McCollum*, 130 S. Ct. 447, 452-53 (2009) ("Because the state court did not decide whether [defendant's] counsel was deficient, we review this element of [defendant's] *Strickland* claim *de novo*."); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts [erroneously] found the representation adequate, they never reached the issue of prejudice, . . . and so we examine this element . . . *de novo*."); see also *Cullen*, 131 S. Ct. at 1410.

For the same reasons, even if it could be argued that the state opinions are deserving of heightened deference under AEDPA, the district court properly concluded that the state court unreasonably applied

the standard established in *Strickland* and *Hill* for determining deficient performance. There can be no dispute that such a startling ignorance of the law falls below the "objective standard of reasonableness" for attorney competence.[24] Because no fairminded jurist could disagree, *Harrington*, 131 S. Ct. at 786 (citing *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)), that counsel's performance was constitutionally deficient, both state opinions fail even doubly-deferential AEDPA review.

II. THE APPROPRIATE REMEDY IS TO ALLOW MR. COOPER TO ACCEPT THE PLEA OFFER THAT HE WOULD HAVE ACCEPTED BUT FOR TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE.

The remedy ordered below—a conditional writ requiring reinstatement of the plea offer—comports with the broad discretion traditionally exercised by habeas courts in correcting constitutional errors and is narrowly tailored to correct the constitutional deprivation. According to the State, this Court must not only upend the universal consensus of the circuits that Mr. Cooper suffered a constitutional deprivation, but also adopt the unprecedented proposition that there is a constitutional deprivation that a habeas court must refuse to remedy. The State's remarkably

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[24] *See Jones* v. *United States*, 224 F.3d 1251 (11th Cir. 2000) (counsel failed to object to wiretap on "clear" ground); *Dixon* v. *Snyder*, 266 F.3d 693 (7th Cir. 2001) (counsel failed to cross-examine sole witness based on misunderstanding of state law and the Fifth Amendment); *Glover* v. *Miro*, 262 F.3d 268 (4th Cir. 2001) (counsel ignorant of state law permitting defendant to compel out of state witnesses to appear); *Dando* v. *Yukins*, 461 F. 3d 791, 798 (6th Cir. 2006) ("flatly incorrect" legal advice regarding defendant's entitlement to a state-provided expert witness).

narrow view of the core function of the writ would render the explicit guarantees of the Sixth Amendment merely hortatory.

A. Federal Habeas Courts Have Broad Discretion to Fashion Appropriate Habeas Corpus Relief.

The federal habeas statute authorizes federal courts to dispose of petitions for habeas corpus "as law and justice require." 28 U.S.C. § 2243. This language has been broadly interpreted "to permit relief short of release," *Wilkinson* v. *Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring), and the Court "has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987). Today, conditional writs are "by far the most common habeas remedies." 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 33.3, p. 1904 (6th ed. 2011). The relief ordered by the district court in this case falls squarely within this broad discretion.

In arguing that "there is no rational remedy," Pet. Br. 23, the State turns the core purpose of the great writ on its head and asks this Court to declare, for the first time, that a habeas court must deny relief in the face of a demonstrable deprivation of a criminal defendant's Sixth Amendment rights. Habeas corpus "has been for centuries esteemed the best and only sufficient defen[se] of personal freedom," *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869), which is why the "scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded

by courts and lawmakers." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969).

This Court has construed the "law and justice" language of the 1867 Habeas Corpus Act, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86, to confer jurisdiction over constitutional deprivations that is of "the most comprehensive character," and so broad that it is "impossible to widen." *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868). At the time *In re Bonner*, 151 U.S. 242 (1894), was decided—holding that a writ should issue invalidating a petitioner's sentence but permitting the state to impose a new sentence consistent with the conviction—"the Court interpreted the predecessor of § 2243 as vesting a federal court 'with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus.'" *Hilton*, 481 U.S. at 775 (citing *Bonner*, 151 U.S. at 261). Additionally, because "judgments about the proper scope of the writ are 'normally for Congress to make,'" *Felker* v. *Turpin*, 518 US 651 ('996) (citing *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996)), there is no sound justification for limiting the authority of habeas courts today.

In the decades following *Bonner*, the federal courts developed conditional release orders as a logical means of effectuating the broad remedial purposes of the writ.[25] This Court again approved of such

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[25] *See, e.g., Coffin* v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) (granting request for leave to file habeas corpus petition challenging conditions of confinement, but not the legality of the prisoner's custody); *Biddle* v. *Thiele*, 11 F.2d 235 (8th Cir. 1926) (granting the writ but permitting the state to retain custody of a prisoner until legally resentenced); *Bryant* v. *United States*, 214 F. 51, 53 (8th Cir. 1914) (permitting the trial court to retain jurisdiction over defendant pursuant to a lawful conviction for

conditional release orders in *Dowd* v. *United States* ex rel. *Cook*, 340 U.S. 206 (1951), in which a prisoner was ordered released if the state failed to provide an appeal within a reasonable time. Indeed, by the middle of the twentieth century, "the conditional release order had virtually replaced the unconditional release order as the preferred form of relief in all but a limited category of habeas corpus cases." Marc M. Arkin, Speedy Criminal Appeal: A Right Without A Remedy, 74 Minn. L. Rev. 437, 506 n.225 (1990). Today § 2243 is properly understood to include many forms of relief beyond release or retrial of guilt that are tailored to correct the specific constitutional deprivation. See Hertz and Liebman, *supra* at § 33.4.

Given the historic trend towards flexibility in fashioning appropriate relief for constitutional violations, it is unsurprising, and fitting, that different habeas courts have tailored different remedies to the facts of each case.[26] It is no different

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the purpose of imposing a legal sentence); *McCoy* v. *McCauley*, 20 F. Supp. 200, 202 (D. Wash. 1937) (ordering that the writ issue and the prisoner released if not resentenced within 30 days).

[26] Similarly, state courts have demonstrated flexibility in designing remedies where the defendant received ineffective assistance at the plea stage and proceeded to trial, many of which aim at allowing the defendant to take advantage of the original plea offer. *See, e.g.*, *HPT* v. *Comm'r of Correction*, 14 A. 3d 1047 (Conn. App. Ct. 2011) (vacating sentence and ordering that defendant be resentenced in accordance with plea offer); *People* v. *McCauley*, 782 N.W.2d 520, 525 (2010) (appropriate remedy is to "conditionally vacate defendant's convictions and sentences and remand this case to allow the prosecution to reinstate its original plea offer, and to allow defendant, with the assistance of counsel, to consider that offer and enter a plea in accordance with its terms"); *Jiminez* v. *State*, 144 P.3d 903 (Okla. Crim. App. 2006) (ordering a modification of defendant's sentence); *Becton* v. *Hun*, 205 W. Va. 139, 145 (1999)

for cases involving ineffective assistance with regard to plea offers.

First, the most common form of relief offered in cases involving forgone plea offers is a conditional writ requiring the state to reinstate the original offer. See, *e.g.*, *Satterlee* v. *Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006) (affirming grant of conditional writ requiring reinstatement of plea offer and subsequent grant of unconditional writ ordering defendant's release); *Hoffman* v. *Arave*, 455 F.3d 926 (9th Cir. 2006) (ordering "the district court to direct the State to release [the defendant] unless, . . . the State offers [the defendant] a plea agreement with the 'same material terms' offered in the original plea agreement."); *Nunes*, 350 F.3d at 1057; *Turner*, 858 F.2d at 1204 (ordering a "new plea hearing during which a rebuttable presumption of vindictiveness would attach to any plea offer made by the State in excess of its original . . . offer"); *United States* v. *Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994) (remanding for consideration of ineffective assistance claim and instructing that defendant "should have the choice between going forward with a new trial or accepting the government's original plea offer."); see also *Day*, 969 F.2d 39 (approving of the remedy of ordering the state to reinstate the offer).

Second, some courts have found it appropriate to order a defendant released where time served was

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(remanding with instructions to consider a reduced sentence); *People* v. *Snyder*, 14 Cal. App. 4th 1166, 1177 (1993) (ordering lower court to reinstate plea if evidentiary hearing demonstrates that defendant would have accepted the plea); *Williams*, 605 A.2d at 111 (ordering that the trial court offer the terms of the original plea offer, and, if defendant refused, to reinstate the original sentence); *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987) (remanding for new trial).

longer than the plea offer on which the ineffective assistance was rendered. See, *e.g.*, *Boria* v. *Keane*, 99 F.3d 492 (2d Cir. 1996); *Williams* v. *Jones*, No. 03-cv-201, 2010 U.S. Dist. LEXIS 103596 (E.D. Okla. Sept. 29, 2010) (adopting agreement of both parties to issue writ and release defendant). Finally, other courts have issued conditional writs that allow the defendant to plead guilty or proceed to a new trial. See, *e.g.*, *Gordon*, 156 F.3d at 381-82; *Beckham*, 639 F.2d at 267 n.7.

B. The Appropriate Remedy Here Is a Conditional Writ Ordering the State to Reinstate the Plea Deal That Mr. Cooper Lost as a Result of Trial Counsel's Affirmative Misadvice.

The conditional writ issued by the district court was rational and narrowly tailored to remedy the deprivation of Mr. Cooper's Sixth Amendment right to effective assistance of counsel at all critical stages of the prosecution. The "competing interests" proffered by the State and the Solicitor General—no more evident here than in any typical habeas proceeding—are not unreasonably burdened by the remedy. Furthermore, they urge consideration of these interests in a manner that subjects Mr. Cooper's valid Sixth Amendment claim to a balancing test on the question of whether any relief should issue, a theory that strongly conflicts with the history of habeas corpus and would mark a radical departure from the decisions of this Court.

1. The Conditional Writ Fashioned by the District Court Was Narrowly Tailored to Remedy Mr. Cooper's Sixth Amendment Claim.

The federal district court, consistent with its broad discretion and in accord with many other federal and state courts, issued a conditional writ requiring the State to reinstate the plea offer that Mr. Cooper declined because of counsel's affirmative misadvice. In doing so, the court narrowly tailored the remedy to place Mr. Cooper in as close a position as possible to the position Mr. Cooper would have been in but for the Sixth Amendment violation.

Remedies for deprivations of the right to effective counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The district court's chosen remedy—a conditional writ ordering the reinstatement of the plea offer—is not only within the scope of permissible remedies and a common form of relief afforded by both federal and state courts in cases involving a forgone plea offer, but also best restores both Mr. Cooper and the State to the circumstances prior to the deprivation. Additionally, because the district court expressed no opinion as to whether the state court can reject the plea bargain in accordance with Michigan's sentencing guidelines or in a manner otherwise consistent with state law, the remedy also takes account of the State's competing interests and the trial court's discretion.

The State's argument that granting relief here would "open[] the floodgates to post-conviction litigation," Pet. Br. 20, is groundless in the face of the perfect unanimity of the federal circuits in

holding that the facts of this case constitute a Sixth Amendment deprivation. See *supra*, pp. 19-20. But even if this were not the case, the legal obstacles that an applicant for habeas must overcome are extensive. First, a holding in this case will only apply to the small fraction—far less than 10 percent[27]—of criminal prosecutions that are not resolved by a guilty plea. *Cf. Bullcoming*, 2011 WL 2472799, at *13 (citing *Melendez Diaz*, 557 U.S., at __ (slip op., at 20) (2009)) (noting the "'small fraction of . . . cases' that " 'actually proceed to trial'" in response to a floodgates argument in a Confrontation Clause case). Second, in order to demonstrate that relief is warranted, a defendant must meet both elements of the *Strickland* test, which this Court has warned is "never an easy task." *Harrington*, 131 S. Ct. at 788 (quoting *Padilla*, 130 S. Ct. at 1485 ("a flood did not flow in [*Hill's*] wake")). Third, a criminal defense attorney's performance is subject to "doubly" deferential review under AEDPA. Where § 2254 applies, a federal habeas petitioner must demonstrate not just that his counsel's actions were unreasonable, but that there is no reasonable argument that counsel's performance was adequate under *Strickland*'s deferential performance prong. *Harrington*, 131 S. Ct. at 788.

Contrary to the State's assertions, Mr. Cooper would not be in a better position as a result of the ordered remedy. To substantiate this "windfall" argument, the State and the Solicitor General miscast the interest at issue as a right to a plea bargain rather than the Sixth Amendment right to

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[27] In 2006, for example, 94% of felony convictions in state courts were the result of defendants entering pleas of guilty. *See* Bureau for Justice Statistics, Felony Convictions in State Courts, 2006 – Statistical Tables (December 30, 2009), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152.

effective counsel at all stages of the prosecution.[28] It is undisputed that Mr. Cooper was deprived of the advice necessary to make an informed decision at a critical stage of the prosecution, and Mr. Cooper is still suffering the consequences of that misadvice. The district court, in ordering that the plea offer be reinstated, demanded no more than what the State had already demonstrated it was voluntarily willing to offer Mr. Cooper. Just as if the court were considering the plea bargain during the pretrial stage, a state court may choose, within the discretion afforded to it under the applicable sentencing scheme, the final sentence in accordance with state law.

Additionally, the concern raised by the Solicitor General that correcting the constitutional violation would encourage "sandbagging"[29] by criminal

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[28] In contrast to Mr. Cooper, the hypothetical defendant, posited at S.G. Br. 28, who accepts a guilty plea that is later withdrawn by the prosecutor or rejected by the court suffers no cognizable Sixth Amendment deprivation; there is simply nothing to remedy. Here, it is uncontested that counsel's advice was constitutionally deficient and alone caused Mr. Cooper to reject the State's initial, and open, plea offer. Pet. Br. 9 n.2.

[29] If "sandbagging" is meant to imply an incentive for collusion between counsel and the defendant in the hope that they will get two bites at the apple, the Third Circuit has, in a case with similar facts, succinctly stated:

"Deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. For these reasons and because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate. Moreover, to the extent that petitioners and their trial counsel may jointly fabricate these claims later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Day*, 969 F.2d at 46 n.9.

defendants is without merit. S.G. Br. 29. Defendants are unlikely to decline favorable plea offers and take their chances at trial, where they usually face more severe sentences, on the off-chance that a reviewing court might later reverse their convictions upon collateral review. Even if it were a danger, however, habeas courts have extensive experience discerning whether counsel's performance constitutes "an abdication—not an exercise—of professional judgment," *McQueen* v. *Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). There is no sound reason to believe that habeas courts are now incapable of differentiating trial strategy—regardless of counsel's motivation—from prejudicial error. Here, it is uncontested that counsel, on the record, Pet. Br. 6, erroneously advised his client to reject the plea offer based on his mistaken belief that the State could not prove AWIM because the victim was shot in the buttocks.

Finally, a rule that adequately vindicates petitioner's Sixth Amendment right to counsel would enhance the "mutuality of advantage," *Brady* v. *United States*, 397 U.S. 742, 752 (1970), for both sides during plea bargaining and provide a much greater incentive for defense attorneys to fulfill their duty to provide adequate assistance at all critical stages of the prosecution. Without the benefit of a finding of ineffective assistance in cases such as Mr. Cooper's, there will be little motivation to ensure that the quality of advice does not fall below what the Sixth Amendment requires. Put simply, the position of the State and the Solicitor General would insulate affirmative misadvice, pocketed pleas, and other forms of non-communication from further review on habeas. Such a scenario is to the detriment of both criminal defendants and to prosecutors who rely on

plea bargaining for the efficient administration of justice.

2. The Ordered Remedy Does Not Burden Any Competing State Interests, but Even If It Did, Relief Correcting Constitutional Deprivations Is Not Subject to a Balancing Test.

The ordered remedy does not "unnecessarily infringe on competing interests," *Morrison*, 449 U.S. at 364. The district court's chosen remedy, like that of dozens of other courts to consider the question under similar facts, complies with this requirement. The Solicitor General, on the other hand, incorrectly treats *Morrison* as if a defendant's right to relief is subject to a balancing test.

The Solicitor General makes two related arguments, both of which are unavailing. First, he claims that ordering the trial court to permit Mr. Cooper to consider the plea offer with assistance of counsel interferes with functions normally committed to the executive. S.G. Br. 30. While the State has a legitimate interest in choosing how to enforce its laws, this Court has been clear that the "Sixth Amendment mandates that the State *bear the risk* of constitutionally deficient assistance of counsel." *Kimmelman*, 447 U.S. at 379 (emphasis added). In the plea offer context, "even if one might perceive that the government's competing interest might be infringed by requiring that the original offer be reinstated, a contrary result would impermissibly shift the risk of ineffective assistance of counsel from the government to" the defendant. *Blaylock*, 20 F. 3d at 1469. Any conceivable burden on the prosecution's discretion pales in comparison to the importance of protecting the Sixth Amendment's guarantee of

effective counsel at all critical stages of the prosecution.

Second, the Solicitor General argues that the narrowly tailored remedy in this case is an impermissible interference with the sentencing discretion of the trial court. S.G. Br. 30-32. While this is indeed a legitimate interest, modification of a state prisoner's sentence is squarely within the range of remedies available to a habeas court to correct a constitutional wrong. See Hertz and Liebman, *supra* at § 33.4. Regardless, under the remedy formulated by the district court in this case, the trial court would be able to consider any plea agreement in accordance with state law, just as it would have if the agreement had been properly presented to the court during the plea stage.

Finally, it is worth noting that in *Morrison*, the Court held that the defendant failed to demonstrate a Sixth Amendment violation, not that her deprivation was not remediable. In that case, the defendant did not allege that the outrageous behavior exhibited by federal agents during her detention had any effect on her choice of counsel or her counsel's ability to provide constitutionally adequate representation during the prosecution, 449 U.S. at 366, facts that stand in stark contrast to the patently erroneous advice that plainly prejudiced Mr. Cooper here. More importantly, the Court did not suggest that a meritorious Sixth Amendment claim could be rendered irremediable because of these other concerns, only that these factors should be considered when fashioning relief.

* * *

The State's burden of persuasion is a heavy one: it must articulate why a court entrusted with the broadest possible powers to correct miscarriages of justice must refuse to remedy an unambiguous deprivation of a defendant's constitutional rights. That the State has failed to meet this burden here is unsurprising. While the barriers to showing a meritorious claim for relief, whether at common law or under AEDPA, are undoubtedly high, there is no basis in this Court's opinions for declining to remedy a constitutional violation that is properly presented to a habeas court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE
CRIMINAL DIVISION

File No. 03-4617

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

ANTHONY GLADNEY COOPER,
Defendant.

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE BRUCE U. MORROW, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 404, Detroit, Michigan, on August 11, 2003.

APPEARANCES:

PAUL BERNIER, Assistant Wayne County Prosecutor, appearing on behalf of the People.

BRIAN McCLAIN, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

August 11, 2003
Detroit, Michigan
10:13 A.M.

* * *

[3] THE COURT: This is the People of the State of Mich:gan versus Anthony Cooper, Case Number 4617. This is an 03 case.

MR. McCLAIN: Brian McClain, your Honor, for the Defendant, Mr. Cooper.

MR. BERNIER: Morning, your Honor. Paul Bernier on behalf of the People.

MR. McCLAIN: Your Honor, my client and I have gone through the presentence report. We do have some additions and corrections to make for the record. Firstly, under the agent's description of the offense it doesn't support—it doesn't include information that was even alleged against my client.

The last sentence says the Defendant was arrested and found to have two plastic bags have marijuana and a point .380 caliber with twelve spent casings. The gun was never found and the casings were found on the scene, but the only thing that was found and ever alleged to be found on the Defendant was the marijuana so—

[4] THE COURT: I'll strike the rest of it.

MR. McCLAIN: Thank you. Under the Defendant's description of the offense I went over that with Mr. Cooper and the last sentence he denies making. He denies making that last sentence.

THE COURT: Which one, that I aidn't shoot her to kill her in any way?

MR. McCLAIN: No, the very last sentence.

THE COURT: That is the very last sentence—

MR. McCLAIN: Oh, I'm sorry.

THE COURT: —Mr. McClain, or part of the last sentence.

MR. McCLAIN: Oh, okay. The first part of the last sentence before the comma. I went to kill her to protect all of us. I'm not sure. Are you saying you didn't say any of that last sentence or just the first part of the last sentence? Which part?

(Whereupon the defense attorney and the Defendant are conferring)

MR. McCLAIN: The first part of the last sentence where it says, I meant to kill her to [5] protect all of us, he denies making that statement.

THE COURT: Well—

MR. McCLAIN: And the last part, was the calculation of the guidelines and I—

THE COURT: Do you have all of my guidelines?

MR. McCLAIN: Pardon me?

THE COURT: Do you have all of the guidelines or just a page of the guidelines?

MR. McCLAIN: I have one page—I'm sorry. There was two pages here.

THE COURT: What I'm saying is I don't have any guidelines.

MR. McCLAIN: Oh, I see. Yeah, I guess so. There's two copies and the one—yes.

THE COURT: What are you saying is incorrect, the prior record variables?

MR. McCLAIN: I have no problem with the scoring of fifty for the prior record variable.

THE COURT: So what are you contesting?

MR. McCLAIN: We're contesting offense variable—offense variable number four. It was scored ten points

for psychological injury to the victim. I believe it should be scored zero because [6] there's no evidence that that occurred. In fact—

THE COURT: Mr. Bernier, anything in the presentence report that would support that score?

MR. BERNIER: Your Honor, I saw nothing in the presentence report that would justify necessarily that. This Court saw the witness testify and I would leave it to this Court's discretion.

THE COURT: All right. I'll change that to zero. I didn't see anything in the presentence report that would suggest that that should receive any score. Anything else?

MR. McCLAIN: Twelve, your Honor. They scored twenty-five for having three or more contemporaneous felonious acts involving crimes against a person. The only—from what I see, the only crime against a person was the AWIM. The others would be under the category of other contemporaneous criminal acts and those would have been felon in possession, possession of marijuana and felony firearm so there would be three other criminal acts.

THE COURT: So it would be ten instead of the other twenty-five.

MR. McCLAIN: Yes, your Honor.

THE COURT: I think ten would [7] be correct which would make the total sixty for offense variable—thirty, forty—

MR. McCLAIN: Oh, seventeen—I'm sorry.

THE COURT: —sixty, seventy, sir.

MR. McCLAIN: I'm sorry. Then offense variable number seventeen we're contesting because it says

only score this with offense that involves operation of vehicle, vessel, a snowmobile, aircraft or a locomotive so that should be scored a zero as well.

THE COURT: So we have thirty, forty, fifty, sixty points.

MR. McCLAIN: Yes, your Honor.

MR. BERNIER: Which would make the guidelines range one thirty-five to two eighty-one with a habitual second.

MR. McCLAIN: Under a habitual sentencing, your Honor, it would be under E-4 which would be one thirty-five. Under the habitual it would be one thirty-five. Habitual third it would be one thirty-five to three thirty-seven.

THE COURT: Okay. Those corrections being made, any other corrections you need [8] brought to the attention of the Court?

MR. McCLAIN: I'm sorry, your Honor?

THE COURT: Any other corrections that you would like—

MR. McCLAIN: No, your Honor.

THE COURT: —to bring to the attention of the Court?

MR. McCLAIN: No, your Honor.

THE COURT: Okay. Anything you want to say on behalf of your client before sentencing?

MR. McCLAIN: Yes, your Honor. We would like to ask the Court to consider going under the guidelines for certain compelling reasons on behalf of Mr. Cooper. Mr. Cooper is a—actually a child of a foster

care system. He spent all of his life in foster care. He comes from a supportive family.

His foster care sister, Tyla Simon (ph), who did testify on his behalf, is here on his behalf. He did reunite once he was released from Louisiana, he came to Detroit to reunite with his biological mother who, she had no contact with him for all his life, and since being paroled in 2002 he has completed his education. He did that in June of 2002 and he was enrolled in school at the Michigan Barber

* * *

APPENDIX B

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION

Case No. 03-04617

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

ANTHONY GLADNEY COOPER,

Defendant.

MOTION

Proceedings had and testimony taken before the HONORABLE BRUCE U. MORROW, Circuit Court Judge, Frank Murphy Hall of Justice, Detroit, Michigan, on Friday, May 28, 2004.

APPEARANCES:

FRANK BERNACKI, Esq., Attorney of the People
Appearing on behalf of Defendant Anthony Cooper.

* * *

[5] A. Yes, I reviewed the transcript involving Luke Skywalker.

Q. Correct, and what I want to talk about is the fact that in that transcript you—talk quite a bit about the fact that you had just received the medical records.

A. Yes.

Q. And there's a discussion about a plea offer and you indicated on that record that the plea offer is unreasonable.

A. Yes.

Q. Can you give the Court a little bit of background about what happened with the medical records and why you made those assertions on the record?

A. Well, before the date of the hearing I had spoke with Mr. Skywalker I believe in his office and at that point we did not—or he did not have the medical records yet. It may have in fact been at a hearing, a prior hearing When he told me that he was expecting the medical records at a future date and that I was to contact him and I believe I contacted him more than once and there was quite a bit of delay before either he got them or he produced them to me. So I believe at the date of this hearing that you're speaking of I had just received the medical records and reviewed them with my client and had not had an opportunity to [6] further discuss those records as it related to a possible plea.

Q. And you stated on the record that you had met with Mr. Cooper at the Wayne County Jail to discuss Mr. Skywalker's plea offer. At that time when you met with Mr. Cooper, did you have the medical records at that time?

A. The last time I met with Mr. Cooper before the hearing with Mr. Skywalker I believe I did have them and I reviewed them with him in the Wayne County Jail.

Q. And what was your assessment when you met with him in terms of the assault with intent to murder charge?

A. It appeared to me and I remember highlighting some information in the report that the information in the medical report did not support the claims of the victim at the Preliminary Exam and did not support the charge of assault with intent to murder

based on the nature of the injuries reported in the medical report.

Q. And did you express that to Mr. Cooper?

A. Yes.

Q. So you thought there was a legitimate issue regarding the assault with intent to murder charge?

A. Yes.

Q. And did you have an opinion about what an appropriate charge would be?

[7] A. Yes. I felt that I could successfully negotiate a plea under the amended charge of assault with intent to do great bodily harm less than murder.

Q. And you spoke with Mr. Cooper on other occasions, I take it, in court?

A. Yes.

Q. And did he ever tell you that he wanted to enter into a plea agreement?

A. We did discuss pleading and he was opened to a plea offer and you know I told him that I would do my best, but I needed to review all the evidence and so, yes, he was opened to discussions of a plea offer.

Q. So he wanted to plead and you were negotiating and at that hearing you indicated that you thought the offer was unreasonable and therefore you were going to try and negotiate with the trial prosecutor; is that correct?

A. That's correct. After review of the medical testimony and talking with Mr. Cooper, the first opportunity I had to speak with the prosecutor about that evidence was at the hearing with Mr. Skywalker at which point he indicated he was not going to be the trial attorney and therefore I wanted to speak or discuss an offer with the person who would be trying the matter because I wanted to discuss the evidence that that attorney would [8] have to present and I felt like I had a better chance of a more reasonable offer

speaking with the person who had the burden of proof at trial and not the person who was not going to try it.

Q. And did you at any time at that hearing on July 17th, and it's not on the record, but I'm going to ask you in case it's not on the record and it happened, did you ever ask the judge, hey judge, I need a few minutes in the back with my client or I need some time with Mr. Cooper to discuss, you know, alternatives and explain to him, you know, what's going on at this point?

A. I don't believe on the record I asked the judge for more time.

Q. Did you ever take him in the back?

A. I did. I did talk to Mr. Cooper in the back about what the offer was briefly, but it was still my desire to discuss those medical reports because I had no earlier opportunity to discuss those reports with anyone. In other words, those reports weren't part of any plea offer or negotiation until that point.

MS. NEWMAN: Okay. That's all I have for now.

CROSS-EXAMINATION

BY MR. BERNACKI:

* * *

[13] BY MS. NEWMAN:

Q. But you had conveyed to Mr. Cooper that you thought there was a good defense to the assault with intent to murder?

A. I did. I told him that my intent was to—I wanted to negotiate a deal based upon GBH and the numbers would have been lower than 4 to 7 that was being offered under the AWIM. So my discussion with him was that I wanted to—I felt that the medical reports did not support the charge AWIM.

THE COURT: Excuse me for a second. Have you had a chance to read the pre-trial?

A. Of July 17th?

THE COURT: Right.

A. Yes, I did.

THE COURT: Today?

A. Yes.

THE COURT: Okay.

MS. NEWMAN: I gave it to him this morning, Your Honor.

THE COURT: Okay.

MS. NEWMAN: Did you have a specific question regarding that, Your Honor? I mean if there's anything you're unclear on, I would like to follow-up.

THE COURT: Well, when I looked at page two [14] Mr. Skywalker starts off "Good morning, Your Honor. Luke Skywalker and Mr. McClain, good morning. Mr. Skywalker and I met a couple of days ago to discuss a plea offer. Mr. Cooper is reading the agreement and I want to put that on the record. Mr. Skywalker: The offer is for today only. Your Honor, it's not a reasonable offer Mr. McClain said. Mr. Skywalker: He's charged with habitual offense. He was a felon in possession of a firearm. We're agreeing that the guidelines would be substantially higher. Felon in possession it would be 81 to 135 instead of 51 to 80. So it states what the offer is and then Mr. McClain states his case and he says on page 3 after reviewing the medical records, Your Honor, I believe that the prosecution does not have the evidence to try this case. We're willing to go to trial, but in the interest of justice and due to the fact that Mr.

Skywalker is not trying the case, I would like to discuss—this with the attorney who will make the case for the prosecution". This seems to suggest that you had the medical records, you reviewed the medical records and it was your assessment based on your reviewing the medical records that the offer that was then given could not be supported by the evidence. That's the way I read this.

[15] A. That's the way I felt. That the offer could not be supported by the evidence.

THE COURT: Right. The medical evidence and all. the other evidence?

A. Correct.

THE COURT: Okay.

MS. NEWMAN: What we talked about last week and that's why we—that's the way I read the transcript as well. In talking about the offer and that he conveyed that to Mr. Cooper and that he didn't think the medical records—

BY MS. NEWMAN:

Q. And when you first spoke with Mr. Skywalker you didn't have those medical records. You got them after you spoke which is why Mr. Skywalker says the offer was reasonable when we spoke.

A. Right.

Q. But you didn't have the medical records?

A. Exactly.

MS. NEWMAN: I have nothing further.

THE COURT: Whose decision was it to go to trial? Was it Mr. Cooper's?

A. Well, my client made the decision to go to trial. didn't make it for him, Your Honor.

THE COURT: Okay. Did Mr. Cooper tell you

* * *

[28] A. Yes, I do.

THE COURT: Now, he hasn't been to law school. So does he know what that means?

BY MS. NEWMAN:

Q. I explained it to him, Your Honor. Did I explain it and—do you understand what that means?

A. Yes, you did.

Q. That anything you told Mr. McClain, he could have testified about and there's no secrets?

A. Correct.

Q. You wrote a couple of letters to the judge in this case;—is that true?

A. Yes, I did.

Q. And in those letters, what did you ask the judge for?

A. A Cobbs agreement, I believe. Yeah, a Cobbs agreement, plea, bargain.

Q. And I know the judge is going to ask these questions which is why I'm going to go here. Where did you get the language about a Cobbs agreement?

A. I picked up on it in the county jail.

THE COURT: Is that from a lawyer?

A. No.

BY MS. NEWMAN:

Q. There are people who refer to themselves as jailhouse lawyers?

[29] A. Correct.

Q. And they like to give advice?

A. Correct.

Q. Did you at any time in these proceedings, starting with the Preliminary Examination forward

contest with Mr. McClain that you had in fact shot Miss Mundy? Did you ever tell him that you didn't shoot Miss Mundy?

A. No, I didn't.

MR. BERNACKI: Your Honor, I'll just make the objection. I'll ask that it not be leading now at this particular time.

THE COURT: I think she wants to push him in a direction so, you know, she's not forcing him to give an answer. So I don't think it's leading.

MR. BERNACKI: Okay.

MS. NEWMAN: Thank you, Your Honor.

BY MS. NEWMAN:

Q. Why don't you, just tell us; Did you talk with Mr. McClain about a plea?

A. Yes, I did.

Q. And was it your intention to go to trial or to enter into a plea?

A. Hopefully I was intending to enter into a plea.

Q. And why was that?

A. Because I was guilty.

[30] Q. And had—you asked Mr. McClain to negotiate a plea on your behalf?

A. He said he was going to negotiate.

Q. He told you that?

A. Right.

Q. And we know from the record that he came to you a few days prior to this—July 17th hearing and talked with you about a plea offer that Mr. Skywalker had made.

A. Correct.

Q. Could you just tell us a little bit about your conversation with him?

A. I had been in the county jail and I hadn't heard from Mr. McClain since a couple of months prior to this, I believe it was May and I was suppose to have a court date June the 13th I believe it was to come over here and discuss a plea and he didn't show-up. So a couple of days, I believe three days before my trial, he came to the county and he told me he had a medical report and in the medical report the victim was shot below the waist and he told me that wasn't attempted murder and that my guidelines—he was going to get it dropped down to great bodily harm and my guidelines for—that was 18 to 84 months and he asked me how did that sound. I said that's good.

Q. So what impression did that leave you with at that [31] point?

A. That I was going to get 18 to 84 months.

Q. You interpreted that conversation that that's what the offer was going to be?

A. Correct.

Q. And were you willing to accept that offer?

A. Yes.

Q. And when you came into court on July 17th the record indicates that you were reading a plea agreement while Mr. McClain was talking with Mr. Skywalker on the record.

A. Correct.

Q. And do you remember the terms of that offer?

A. Right. It was 4 to 7.

Q. Roughly 51 to 85 months that we've been referring to as 4 to 7?

A. Correct.

Q. And were you willing to accept that plea offer?

A. Yes.

Q. And what happened in the courtroom? Why didn't you accept it?

A. Because my lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist. It was—I couldn't get that charge. He told me I couldn't get it.

[32] Q. You couldn't get it. All right. That's fine. That was your understanding that you couldn't get assault, with intent to murder?

A. Correct.

Q. Based on the medical reports?

A. Correct.

Q. And that's why Mr. McClain was turning down the offer?

A. Right.

Q. Essentially because the facts didn't support the charge?

A. Right.

Q. You've heard the testimony from Mr. McClain today and you and I have had multiple opportunities to chat. If Mr. had taken you aside like I just took you aside and said look, Mr. Cooper, I think you can be convicted of assault with intent to murder even if I think this is really nothing more than a great bodily harm, certainly a jury still might find you guilty of assault with intent to murder. Your guidelines for that are at least double, if not triple, what the prosecutor is offering. We have no really reasonable defense to these charges. Would you have been willing, you know, this is a gamble. That you might be able to go ahead and negotiate something better at the trial date, but I'm telling you it's a big gamble. Did you [33] have any information of that nature?

A. No.

Q. What information did you have, just tell us?

A. He told me that the prosecution couldn't prove his case because the person was shot below the waist

and that's not attempted murder. It was great bodily harm and that he was going to get me a plea bargain.

Q. So—let's go back to that date. I'm, telling you it is assault with intent to murder. No question about it. There's no reasonable viable defense to these charges. The guidelines are at—least half of what they would be if they had been scored properly. Would you have taken the plea offer of pleading to assault with intent to murder with a guideline sentence within the range, a minithum-sentence within the range of 51 to 85 months?

A. Yes.

MS. NEWMAN: I don't have any further questions then.

CROSS-EXAMINATION

BY MR. BERNACKI:

Q. You've been convicted before, hadn't you, prior to this date?

A. Right.

Q. And that was by a plea, wasn't it?

A. Correct.

[34] Q. So you knew what the plea procedure was, being charged and everything?

A. Right.

Q. At the final conference which was like back in May, you didn't plead at that time, did you?

A. No.

Q. Because the offer was too high, it wasn't acceptable to you?

A. In May?

Q. Yes.

A. I didn't get a plea offer in May.

Q. When was the first time you were aware that you had a plea offer? I mean you always could have pled guilty. You knew that, didn't you?

A. Right.

Q. You wanted a lesser? You didn't want to be convicted of assault with intent to murder, correct?

A. I wanted a plea offer.

Q. Well, what did you want? Did you—want probation?

A. I know I couldn't get probation.

Q. You wanted to get rid of the felony firearm?

A. No.

Q. You wrote a letter to the judge asking if he could may be get you a plea to felonious assault?

A. Right.

* * *

[37] THE COURT: And you shot her because you thought that she was going to harm Mrs. Smith and may be harm you?

A. At that time, yes.

THE COURT: Now, I know Mr. McClain told you that you can think somebody is armed and be mistaken and still be found not guilty. You knew that. You know, you don't have to be right. If you have an honest and reasonable belief you can defend yourself and later turn out to be wrong. He told you that I know.

A. No.

THE COURT: You didn't know that?

A. You—said did he tell me that?

THE COURT: Did you know that?

A. What's the question?

THE COURT: Did you know that the law says that if you reasonably and honestly believe that you're about to be seriously hurt, that you can defend yourself even if later it turns out that you were wrong

about what you thought you believed. If I see you reaching for your waistband and I think you have a gun in there, I don't have to see that gun and let you shoot me before I can shoot you back.

A. Okay.

[38] THE COURT: You know that, right?

A. Right.

THE COURT: So you knew that—if you saw a gun, you didn't have to wait for her to shoot at you first. That you could shoot at her first to defend yourself and Mrs. Smith, right?

A. Okay, right.

THE COURT: Didn't you argue with Mr. McClain about, man, I did—I was defending myself? I want to go to trial because I was defending myself?

A. No.

THE COURT: When did you give up on the self-defense claim?

A. We never really got a chance to discuss a strategy never knew I was going to trial until the trial started. So we didn't discuss that until the trial started.

THE COURT: So at the final conference when he said that that offer is rejected and when you signed the final conference form that gave the trial date, you're telling me you didn't know you were going to trial?

A. Right. I knew I was going to trial then. I never talked to him—after that.

THE COURT: When you were sitting down [39] looking at the plea offer because there's reference in

the transcript that my client is looking at the offer right now. Do you remember doing that?

A. I didn't sit down. I was standing right there. I remember looking at the plea offer.

THE COURT: And what did you think? Did you think, dang, this is a good offer? I better—jump on this joker because I'm wrong as all get out?

A. Can I tell you what happened?

THE COURT: Did you think that? That was my first question.

A. At the time, no, because he was telling me that I couldn't be found guilty. The plea bargain was unreasonable.

THE COURT: Was it his opinion? You took it as his opinion, didn't you?

A. I didn't know what made the charge different between attempted murder and great bodily harm.

THE COURT: Help me out now because you asked me about felonious assault. So you must have had some understanding about what felonious assault was. Come on, Mr. Cooper.

A. Right.

THE COURT: Let's lay it all out. You heard his argument at the Preliminary Examination about the

* * *

[43] A. Right.

THE COURT: And how long did you all discuss the case or you didn't really discuss the case?

A. No, we didn't discuss—the case.

THE COURT: So what did you discuss?

A. He came over and told me that he got the medical report and that my guidelines for great bodily harm was 18 months to 84 months and that we go to court tomorrow because I didn't even know I was suppose to come to court the next day.

THE COURT: And you didn't ask him any questions of course?

A. No. I was happy to get the 18 to 84 months.

THE COURT: Well, you didn't say I got a self-defense claim?

A. No.

THE COURT: She had a gun?

A. No.

THE COURT: So you were willing to plead guilty to something you thought you had a defense to?

A. Yes.

THE COURT: So you were, what, not going to mention that she had a gun and you shot in self-defense when you took the plea? You were going to leave that little part out?

* * *

[48] MS. NEWMAN: I do.

BY MS. NEWMAN:

Q. Did you write a letter to Mr. McClain as well?
A. Yes, I did.
Q. And in that letter did you explain some of the things, the same things that you explained to the judge?
A. I wrote him. I was telling him I wanted a plea bargain.—I really can't remember exactly what I

wrote Mr. McClain. It was may be like, may be in April.

Q. But you wanted a plea and was he visiting with you on a regular basis at the Wayne County Jail so you could talk about your case?

A. No, I never seen him.

Q. Did he ever write you letters and ask you to provide him with any information about your case?

A. No.

Q. Did he ever talk, if you know, talk to anybody else to see if they could provide information about your case? Not that I know of.

A. He never came and said, Mr. Cooper, I know I haven't been meeting with you, but I've been talking with all these other people?

Q. No.

A. So you're sitting in the county jail. You've expressed to him repeatedly that you want a plea and what's your

* * *

[51] the county and told me that I was coming over here to get 18 to 84 months. So I called my family. I told my family not to come to court that particular day because I was just coming to get 18 to 84 months. When I stepped in the courtroom, Mr. McClain and the prosecutor was already talking. They was already kind of arguing. So I stepped over here in front of the bench and my attorney was saying that—telling the judge that the plea was unreasonable. Now, I'm thinking it was 18 to 84 months. So I asked him what is he talking about. So he showed me on a notebook paper 4 to 7 and they got—him and the prosecutor got to arguing about this is unreasonable based on the medical report. This is my first time hearing about a 4 to 7. I'm coming in here thinking I'm getting 18 to 84 months. So after they're going back-

and-forth arguing, my lawyer told him that he couldn't prove his case and that we would go to trial and that was it. I didn't know I was going to trial. I came in here thinking I was about to get a plea bargain and that's not what happened.

MS. NEWMAN: Okay. That's it, Your Honor.

Thank you.

MR. BERNACKI: Can we have that letter marked, Your Honor?

* * *

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 17 2011
OFFICE OF THE CLERK

No. 10-209

In the Supreme Court of the United States

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

It is undisputed that Respondent Cooper committed assault with intent to murder. It is also undisputed that Cooper's sentence is precisely what the Michigan Legislature prescribed for that crime. There is no "miscarriage[] of justice," Resp. Br. 46, when a defendant is fairly convicted and forced to pay the full penalty that the People have approved as appropriate for the criminal conduct in which the defendant chose to engage.

Ideally, every criminal defendant would pay this full penalty. But prosecutors sometimes make pre-trial deals due to a lack of resources, a desire to shield victims from having to testify at trial, or to avoid the risk of an acquittal. But the circumstances change after trial, because the potential benefits of a plea deal are no longer available: the prosecutor has expended resources, the victim has been cross-examined, and the jury has found proof beyond a reasonable doubt. And it makes no difference whether trial went forward because the prosecutor never made an offer, the defendant chose not to accept an offer, or a trial judge rejected an accepted offer; the mere fact that a trial took place extinguishes any benefit the prosecutor could have otherwise obtained from a plea deal.

Cooper says that he is somehow constitutionally prejudiced by having to serve the full sentence for a person convicted of assault with intent to murder. In other words, he asserts a right to consummate a better deal, even though the Constitution guarantees no such right. But in making that argument, Cooper misconstrues this Court's ineffective-assistance-of-counsel precedent in two respects.

Cooper first misapprehends *Strickland*'s primary teaching: it is not enough to show that ineffective assistance resulted in a lost opportunity; a defendant must prove that deficient performance "*deprive[d] the defendant of a fair trial*, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984) (emphasis added). According to Cooper, prejudice will almost always be established when a criminal defendant complains that he would have pled guilty, because he would have received a lesser sentence. That analysis collapses the two-part *Strickland* test into a single prong, examining alone whether trial counsel's performance was deficient. Thus, the test becomes one that guarantees the "best outcome."

But *Strickland* requires more. This point is exemplified by *United States* v. *Mechanik*, 475 U.S. 66 (1986). There, competent counsel would have successfully moved for dismissal of the indictment based on a procedural defect at the grand-jury stage. Defendant's counsel missed that opportunity, and the defendant was later convicted. This Court refused to set aside the conviction based on ineffective assistance, because the fair trial rendered "any error in the grand jury proceeding . . . harmless beyond a reasonable doubt." *Id.* at 70. As Judge Gorsuch observed in his *Williams* dissent, "It seems more than unlikely that the Constitution could be offended by a fair trial that occurs because of the loss of a plea bargain to which the defendant had no entitlement, but not by a fair trial that occurs only after counsel failed to pursue defendant's entitlement to a dismissal of the indictment." *Williams* v. *Jones*, 571 F.3d 1086, 1103 (10th Cir. 2009) (Gorsuch, J., dissenting).

Cooper also misinterprets the primary teaching of this Court's decision in *Fretwell*, which requires a defendant to show that ineffective assistance deprived him of a "substantive or procedural right to which the law entitles him." *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993). *Fretwell* involved a defendant who could have avoided the death penalty had his lawyer raised a certain point of law (later overruled by this Court) at sentencing. Despite the greatest possible lost opportunity—avoiding a death sentence—this Court rejected the claim because giving the defendant the benefit of a legal argument later held erroneous would "grant [him] a windfall to which the law does not entitle him." *Id.* at 370. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369.

Here, Cooper lacks a substantive or procedural right to a plea deal, and his attorney's ineffective assistance at the plea stage ultimately resulted in a fair trial with a reliable result. There is no constitutional basis for granting Cooper a "do over" based on a lost opportunity, because there is no constitutional right to a plea offer. Moreover, Cooper does not deserve this windfall. Now that a jury has rejected his theory of innocence, the Constitution does not require the prosecutor to extend a previously-rejected plea offer, regardless of the reason for the rejection. Accordingly, the State of Michigan respectfully requests that the Court reverse the court of appeals.

REPLY ARGUMENT

I. A lost opportunity to consummate a plea bargain does not undermine confidence in the result at trial.

This Court's opinion in *Strickland* could not be clearer: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process *that the trial cannot be relied on as having produced a just result*." 466 U.S. at 686 (emphasis added). Respondent Cooper does not contend that his trial produced an unreliable result; accordingly, that should be the end of the story.

Tellingly, Cooper does not even acknowledge this key language from *Strickland*. Instead, Cooper propounds the same watered-down prejudice standard that the federal circuits have applied when evaluating ineffective-assistance cases involving rejected plea agreements: whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Resp. Br. 24, 26 (quotation omitted); accord ABA Amicus Br. 16; Center on the Admin. of Criminal Law Amicus Br. 15; Nat'l Assoc. of Criminal Defense Lawyers Amicus Br. 6; Constitution Project Amicus Brf. 12. This Court should reject that standard for two reasons.

First, Cooper's test (evaluating whether the result of the proceeding would have been different) is only a partial quote from *Strickland*. He omits the very next sentence: "A reasonable probability is a probability *sufficient to undermine confidence in the outcome*." 466

U.S. at 694 (emphasis added). Two paragraphs later, the opinion reiterates this point, "*the question is whether* there is a reasonable probability that, absent the errors, *the factfinder would have had a reasonable doubt respecting guilt.*" *Id.* at 695 (emphasis added). When an attorney gives defective plea advice and his client is then convicted following a fair, constitutional trial, there is no effect on the reliability of the guilty verdict. In *Strickland* terms, nothing Cooper's lawyer did at the plea stage could have caused the factfinder "to have had a reasonable doubt respecting guilt." *Ibid.*

Instead, Cooper argues that, but for his attorney's ineffective assistance, he never would have gone to trial. Resp. Br. 17 ("there should not, and would not have been a trial in this case at all had Mr. Cooper received minimally competent advice"). But that argument has nothing to do with the *Strickland* test. A trial, standing alone, is not prejudice; an *error-free* trial certainly is not prejudice. Rather, under *Strickland*, proof of prejudice requires a defendant to show doubt about the conviction. And where (as here) a defendant alleges that he would have pleaded guilty to the underlying facts to obtain a favorable plea deal, the jury's finding looks *more* reliable, not less.

As noted above, *Mechanik* exemplifies the approach this Court takes when confronted with an allegation of pre-trial ineffective assistance that did not raise any concerns about the reliability of the trial result. There, a guilty verdict rendered "any error in the [pre-trial proceedings] . . . harmless beyond a reasonable doubt." 475 U.S. at 70. Accordingly, there was no basis to set aside the conviction, even though the defendant lost the opportunity to dismiss the indictment altogether:

> The[] societal costs of reversal are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way *when an error has had no effect on the outcome of the trial.*

Id. at 73 (emphasis added). See also, e.g., *Coleman* v. *Alabama*, 399 U.S. 399 U.S. 1, 11 (1970) (failure to provide counsel at a preliminary hearing is subject to harmless error analysis, even though the hearing is a critical stage). And although Lafler's initial brief gave considerable attention to *Mechanik* and the principles it embodies, Pet. Br. 17, 18, 19, Cooper does not even cite the case, presumably because he cannot explain how the result should be any different here.

Second, Cooper's watered-down standard has the practical effect of eliminating *Strickland*'s prejudice inquiry in many cases. Acceptance of a plea agreement will frequently result in a shorter sentence than conviction.[1] In other words, but for counsel's unprofessional conduct at the plea stage, there will virtually always be a reasonable probability that the

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[1] Although Cooper's claim could be interpreted as a complaint that his *sentence* was the result of ineffective assistance, that is not really the case. It is undisputed that the sentence Cooper desires (via specific performance of the plea offer) is unavailable for a person convicted of assault with intent to murder. And Cooper cannot claim prejudice based on the inability to pursue something the law forbids. *Nix* v. *Whiteside*, 475 U.S. 157 (1986); contra Resp. Br. 29 ("Because of that affirmative misadvice, Mr. Cooper is now serving a much higher sentence than that offered in the plea bargain.").

result of the proceeding will be different if a criminal defendant does not plead guilty because of deficient advice. As a result, under Cooper's test, the only prerequisite for an ineffective-assistance claim involving a rejected plea is proof of attorney negligence. There is no basis for such a test anywhere in this Court's precedent, and this Court should emphatically reject it.

In support of his prejudice-less test, Cooper cites this Court's decisions in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), and *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010). That reliance is misplaced. Both *Hill* and *Padilla* involved ineffective assistance in a defendant's *acceptance* of a plea.

Cooper mistakenly asserts that for the purpose of examining whether an attorney has provided effective assistance, there is no "differen[ce]" between a criminal defendant who decides to accept an offer and one who pleads guilty. Resp. Br. 18. But this argument ignores the significance of the plea. The plea acceptance deprives a defendant of his constitutional right to trial, because that right has been waived. Accordingly, there is no jury verdict in which to be confident. In contrast, "a not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial, and it is effective whether or not it is made knowingly and voluntarily." *Williams*, 571 F.3d at 1098 (Gorsuch, J., dissenting).

In other words, an *assertion* of rights (pleading not guilty, remaining silent, proceeding while represented by counsel) does not have to meet the same constitutional standards as a *waiver* of rights (pleading guilty, talking to the police, proceeding *pro se*). Here,

Cooper asserted his rights and proceeded to trial, and a jury convicted him. It is therefore appropriate to apply *Strickland*'s confidence-in-the-jury-verdict test. And because there is no lack of confidence in the trial outcome based on a defendant's rejection of a plea offer (no matter the reason), there is no basis to grant Cooper's request for relief.

II. A lost plea deal does not deprive a defendant of a substantive or procedural right.

As explained in Lafler's initial brief, Cooper's claim also fails because he is unable to show that ineffective assistance deprived him of a substantive or procedural right. Pet. Br. 21–23 (citing *Fretwell*). That is because "there is no constitutional right to plea bargain." Pet. Br. 21 (quoting *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977)). Cooper has two responses; both lack merit.

Initially, Cooper says that *Fretwell* was of no lasting significance, its holding confined to the "exceptional" facts presented there. Resp. Br. 27–28. That position is belied by this Court's post-*Fretwell* decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), which reaffirmed that "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any *substantive or procedural right* to which the law entitles him." *Id.* at 393 n.17 (emphasis added).[2]

Next, Cooper says that an inquiry into substantive or procedural rights "is irrelevant in this case where a

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[2] Cooper quotes from *Taylor* but neglects to include this Court's statement regarding substantive and procedural rights. Resp. Br. 27.

specific and favorable plea bargain had been offered and was open at the time counsel rendered his constitutionally defective advice." Resp. Br. 29. That argument misses the point. In *Fretwell*, at the time counsel failed to raise the winning argument that would have saved his client from the death penalty, the legal argument was likewise "available." That fact made no difference to the prejudice inquiry: "Because the result of the sentencing proceeding . . . was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure," there was no *Strickland* prejudice. *Fretwell*, 506 U.S. at 366. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Ibid.* It is a novel suggestion that the mere extension of a plea offer creates a right to avoid trial.

The same conclusion applies here. Because Cooper lacks a substantive or procedural right to plea bargain, *Weatherford*, 429 U.S. at 561, much less to a specific plea, he cannot prove prejudice under *Strickland*. And there is nothing unfair about forcing Cooper to serve the full sentence for someone found guilty of committing assault with intent to murder.

III. Cooper's overarching error relates to his misunderstanding of the nature of prejudice under *Strickland*.

Cooper's remaining arguments ignore or misapply *Strickland*'s requirement that a criminal defendant prove that deficient performance deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687.

First, Michigan's position does not require this Court to "adopt the unprecedented proposition that there is a constitutional deprivation that a habeas court must refuse to remedy." Contra Resp. Br. 34. Cooper attacks a straw man when he asserts that habeas courts have the power to set aside convictions or order specific performance when necessary to remedy a constitutional violation. The question here is whether such a constitutional violation has occurred. The Sixth Amendment guarantees effective "Assistance of Counsel," but counsel's actions do not violate the Amendment unless they cause the defendant cognizable prejudice, i.e., a suspect trial result. The problem here—just like in *Mechanik*—is not a refusal to provide a judicial remedy, but Cooper's inability to prove *Strickland* prejudice.

Second, Cooper is wrong when he argues that a fair trial cannot cure a lost opportunity to plead guilty. Resp. Br. 16–19. In support, Cooper cites *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006), and *Bullcoming* v. *New Mexico*, 131 S. Ct. 2705 (2011), for the proposition that once the Sixth Amendment is violated, "no additional showing of prejudice is required to make the violation complete." Resp. Br. 18. But *Gonzalez-Lopez* involved a trial court error that deprived the defendant of his right to choice of counsel, which "has never been derived from the Sixth Amendment's purpose of ensuring a fair trial." *Gonzalez-Lopez*, 548 U.S. at 147. This Court held that the nature of the right is bound up with the attorney's identity, and a deprivation cannot be remedied by another attorney. By contrast, the right to effective assistance of counsel is *not* a structural error. *Strickland* and dozens of subsequent cases confirm

that establishing a Sixth Amendment violation in that context requires that the defendant show prejudice.

Similarly, *Bullcoming* involved the defendant's right under the Confrontation Clause to cross-examine a witness in open court, and held that no other procedure could substitute for confrontation. Where a Confrontation Clause error is harmless, however, that error provides no grounds for setting aside the conviction. See *Bullcoming*, 131 S. Ct. at 2719 n.11; *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683–84 (1986). Neither *Bullcoming* nor *Gonzalez-Lopez* even suggests that the ordinary *Strickland* prejudice inquiry should not apply in this context. If Cooper was correct, there would never be a need for a *Strickland* prejudice inquiry; simply proving deficient performance, standing alone, would be sufficient to throw out the conviction.

Third, Cooper errs in his attempt to address why requiring the prosecution to re-extend the plea offer is the proper remedy based on counsel's deficient performance, even though it impinges on an executive function. Resp. Br. 44. Cooper says that the interest of the prosecution to protect its authority in this sphere "pales" in comparison to his Sixth Amendment right. Resp. Br. 44. This position understates the importance of the prosecution maintaining its discretion to extend plea offers and of the benefits of avoiding trial. Here, for example, the prosecutor has lost all pre-trial consideration, such as the time and cost of conducting a jury trial, the ability to shield the victim from having to undergo cross examination, and avoiding the risk of an acquittal. And the prosecutor may learn additional facts as a result of going to trial that, had they been

revealed earlier, would have caused the prosecutor not to offer the plea in the first instance.

Fourth, Cooper erroneously fails to acknowledge that a ruling in his favor (i.e., granting him the same plea following a constitutionally valid trial) would place him in a much better position than before trial. Resp. Br. 41 ("Mr. Cooper would not be in a better position as a result of the ordered remedy."). Cooper has had an opportunity to test his claim of innocence before a jury, and it was rejected, yet he wants a plea offer made before the prosecution had to run the risk of an acquittal. To set aside a guilty verdict because the defendant would have pleaded guilty, and to give him a plea bargain that lacks mutuality of obligation (i.e., the defendant gives up nothing), would be the strangest of Sixth Amendment remedies.

Fifth, Cooper agrees that conducting a second trial is not an appropriate remedy. See Resp. Br. 39–45 (advocating instead that the lost plea be reinstated). But a second trial is precisely what will sometimes occur under Cooper's approach. To circumvent the reality that Cooper lacks a constitutional right to have his plea deal accepted, he concedes that once the plea is re-offered, the state trial court could still "reject the plea bargain in accordance with Michigan's sentencing guidelines or in a manner otherwise consistent with state law." Resp. Br. 40, 45. To begin with, that position is contrary to the one Cooper took below. At Cooper's request, the District Court ordered specific performance of the plea offer. Cooper is actually backing away from that remedy and re-characterizing the relief that he has won.

More important, Cooper's concession exemplifies the illusory nature of the "right" Cooper seeks to enforce. And it also illustrates the lack of *Strickland* prejudice. If the state court does reject his plea, the prosecutor will be forced to go to trial a second time, *even though there was nothing constitutionally improper about the first trial.*

Sixth, adopting Cooper's test does not create "incentives for counsel to understand and communicate the elements of a crime with which his client is charged." Resp. Br. 15. Michigan, like the ABA, believes that members of the defense bar seek to comply with their ethical responsibilities, rules of professional conduct, and standards of care. ABA Amicus Br. 23. The question in this case is not whether attorneys will generally seek to provide correct advice, but whether Cooper suffered cognizable prejudice when (for whatever reason) his attorney did not provide correct advice. Prejudice is a distinct component of the Sixth Amendment standard, apart from attorney performance, and the prejudice test appropriately focuses on whether the defendant has been deprived of any substantive or procedural right to which the law entitles him.[3] The test does not focus on punishing the prosecution for defense counsel's missteps.

The ABA attempts to make the same point, citing *Kimmelman* v. *Morrison*, 477 U.S. 365, 386 (1977).

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[3] Cooper has the same problem with his surgeon and contractor hypotheticals. Resp. Br. 21. The requirements that a surgeon obtain consent or that a contractor conduct a proper survey do not include a prejudice component. An ineffective assistance claim does. And prejudice in the ineffective-assistance-of-counsel context is the effect on the right to receive a fair trial.

ABA Amicus Br. 18. But *Kimmelman* merely held that defense counsel's failure to conduct pre-trial discovery and to move for suppression warranted a prejudice hearing. *Kimmelman* did not decide the "more difficult question[:] whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*." *Id.* at 391 (Powell, J., concurring). Thus *Kimmelman* does *not* say that a court may find ineffective assistance even in the absence of an unreliable guilty verdict. That is the question posed here.[4]

Finally, Cooper denies that a ruling in his favor will "open the floodgates to post-conviction litigation" because (1) only a fraction of prosecutions are not resolved by a guilty plea, and (2) a defendant must meet both elements of the *Strickland* test. Resp. Br.

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[4] The Center on the Administration of Criminal Law suggests that prosecutors should always offer any plea bargain "on the record in the presence of the defendant." Center Amicus Br. 23–29. That suggestion may sound good in theory, but it is hopelessly impractical. In 2010, there were more than 300,000 new case filings in Michigan Circuit Court, Michigan's trial court of general jurisdiction. Michigan Supreme Court Annual Report at 32 (2010). Available at http://courts.michigan.gov/scao/resources/publications/statistics/2010/2010ExecSum.pdf. With only 219 Michigan Circuit Court judges, *id.* at 69, that is an average of roughly 1,370 new case filings per judge per year. This Court's imposition of an extra-constitutional burden—placing all pleas on the record in open court—is neither wise nor necessary.

Nor is there any dispute in this case about what the plea offer was or whether the defendant rejected it. The problem is defense counsel's strategic advice about the best course of action. No one suggests that the attorney's legal advice should be placed on the record. The Center's proposal does nothing to solve the problem actually presented by this case.

40–41. But it is not difficult to imagine that once criminal defendants realize they are playing with "house money" under Cooper's test, Pet. Br. 20, there will be far fewer cases resolved by a guilty plea. And as explained above, Cooper's test collapses the two-part *Strickland* test into a single inquiry regarding the effectiveness of counsel's advice at the plea stage. Once that inquiry is satisfied, prejudice will likely ensue because a plea-based sentence will likely be shorter than a sentence imposed after a trial and conviction. A ruling in Cooper's favor is an invitation for upsetting myriad jury convictions based on after-the-fact assertions of flaws in the plea process. And while Cooper asserts that his rule does not apply where a defendant is merely "second guessing" his counsel's strategic decisions, Resp. Br. 15, it is difficult to see how his approach can be so narrowly cabined.

In any event, the answer is even clearer that Cooper is not entitled to relief when this issue is examined under the prism of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). Cooper struggles to explain that the state trial court did not reach the merits of this issue on the issue of prejudice, asserting that the court's determination "lack[ed] any support in the record" that Cooper had raised a claim of self-defense with his counsel pretrial. Resp. Br. 32. But the record directly supports this factual determination by the state court in its questioning of Cooper's state trial counsel:

> THE COURT: I mean *[Cooper] said that she had a gun and shot in self-defense* because he didn't know what she was going to do. Didn't he tell you that?

> A. I remember that. I remember discussing that, yes.

Motion hearing, May 28, 2004, p. 16 (emphasis added). And trial counsel testified that Cooper did not back down from this position. *Id.* at 17. As a consequence, Cooper has not overcome the presumption of correctness of the state court's factual determinations. 28 U.S.C. § 2254(e)(1).

Once recognized that the state courts rejected Cooper's claim on the merits on the issue of prejudice, the conclusion that there is no clearly established law requiring the result directed here by the Sixth Circuit is manifest. There is no case from this Court that would require the prosecution to re-extend its plea offer after a fair trial because of the pre-trial deficient advice of counsel. See *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006) (requiring that the clearly established law had to emanate from this Court's holdings). To the contrary, as already noted, a criminal defendant must show under *Strickland* that the deficient advice affected the fairness of the trial.

In sum, the right of an accused to effective assistance of counsel is "recognized not for its own sake," as Cooper maintains, but "because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). "Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* Cooper cannot prove a Sixth Amendment violation here, because nothing in his counsel's plea-stage conduct suggests "that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Accordingly, this Court should decline to adopt Cooper's suggestion that every allegation of bad advice in connection with a rejected plea constitutes a *per se* Sixth Amendment violation. Alternatively, the State asks that the Court reverse because the Sixth Circuit's view was not "clearly established" at the time of conviction, as 28 U.S.C. § 2254(d) requires before a court may grant habeas relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Dated: AUGUST 2011

AMICUS CURIAE BRIEF

No. 10-209

In the Supreme Court of the United States

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a state habeas petitioner is entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial.

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea-bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures.

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In the Supreme Court of the United States

No. 10-209

BLAINE LAFLER, PETITIONER

v.

ANTHONY COOPER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an asserted Sixth Amendment claim of ineffective assistance of counsel based on allegedly deficient advice to forgo a guilty plea, after which the defendant was convicted at a fair trial. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the Court's analysis will likely affect federal prisoners' ineffectiveness claims under 28 U.S.C. 2255. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

Following a jury trial in the Circuit Court of Wayne County, Michigan, respondent was convicted of assault with intent to murder, being a felon in possession of a

firearm, possession of a firearm in the commission of a felony, and misdemeanor possession of marijuana. He was sentenced to 185 to 360 months of imprisonment. The Michigan courts denied postconviction relief, but the district court granted habeas corpus relief on grounds of ineffective assistance of counsel in plea negotiations. The court ordered the State either to reinstate a plea offer that respondent had declined before trial or to release respondent altogether. The court of appeals affirmed. Pet. App. 1a-22a.

1. The evidence showed that, on March 25, 2003, respondent shot Kali Mundy on a street in Wayne County, Michigan. Respondent drew a handgun, pointed it at Mundy's head, and fired from a range of six feet. The shot missed and Mundy ran, but respondent continued to fire and two shots struck Mundy, in her buttocks and thigh. One bullet pierced Mundy's intestines, inflicting a life-threatening injury that required surgery and continues to cause Mundy daily pain. A police officer witnessed the shooting, and respondent was apprehended almost immediately. Pet. App. 2a-3a.

2. After the preliminary examination hearing, the prosecutor communicated a verbal plea offer to respondent's lawyer, Brian McClain. Under the proposal, respondent would have been allowed to plead guilty to assault with intent to murder and would have faced a below-sentencing-guidelines minimum sentence of 51 to 85 months of imprisonment. Respondent was willing to accept a plea offer because he "was guilty," but McClain changed respondent's mind by telling him that, because the victim was injured below the waist, the State could not establish the element of intent. McClain believed that, closer to trial, the prosecutor would ultimately offer a plea deal of 18 to 84 months, even though he later

acknowledged that he was unaware of any instance in which a prosecutor's plea offer had improved by the time of trial absent a change in the evidence. Pet. App. 4a-5a. When the prosecutor reduced the offer to writing, McClain rejected it, stating on the record that the offer was "not reasonable" and that the prosecutor had insufficient evidence to try the case. *Id.* at 5a. At that point, the prosecutor withdrew the offer. The court did not ask respondent for his views and respondent did not volunteer any comment. *Ibid.*

Before trial, respondent sent a letter to the court offering to plead guilty to felonious assault, which carried a lower sentence than the deal offered by the prosecutor. In the letter, he stated that Mundy had a gun and that he shot her because he believed she was going to harm another person. Lacking the authority to compel the prosecutor to accept such a deal, the court took no action. Then, on the first day of trial, the prosecution offered respondent a plea deal less favorable than its earlier offer: the guidelines range for respondent's minimum sentence would have been 126 to 210 months. Respondent rejected the offer. Pet. App. 6a.

3. At trial, the defense did not dispute that respondent had committed the shooting. Instead, the defense offered testimony about a previous dispute between Mundy and a companion of respondent's; the defense argued that Mundy was responsible for the confrontation and, indeed, had been lying in wait for respondent. The defense also advanced the theory that the location of Mundy's injuries suggested a lack of intent to kill. Pet. App. 6a.

The jury found respondent guilty on all charges. See p. 2, *supra*. The trial court imposed a sentence of 185 to 360 months of imprisonment. Pet. App. 6a-7a.

4. Respondent did not appeal. In a postconviction proceeding in state court, however, he argued that McClain had rendered ineffective assistance by, among other things, counseling him to reject the prosecutor's plea offer. After an evidentiary hearing at which both respondent and McClain testified, the state trial court rejected the claim, finding that both respondent and McClain were convinced that respondent could not be convicted of assault with intent to murder and that "[respondent] had made his own choices." Pet. App. 7a.

The Michigan Court of Appeals affirmed in an unpublished per curiam opinion. Pet. App. 44a-47a. The court reasoned that "[t]he record shows that [respondent] knowingly and intelligently rejected two plea offers and chose to go to trial." *Id.* at 45a.

The Michigan Supreme Court denied respondent's application for leave to appeal. Pet. App. 43a.

5. Respondent then filed a federal habeas petition under 28 U.S.C. 2254, in which he renewed his ineffective-assistance claim. The district court conditionally granted relief. Pet. App. 24a-32a. The court concluded that the state courts had unreasonably applied the clearly established standards governing ineffective-assistance claims, as set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 38a. The court held that McClain had provided respondent with ineffective assistance by advising him that the circumstances failed to satisfy the elements of assault with intent to commit murder and that McClain could negotiate a better deal. *Id.* at 38a-40a.[1]

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[1] As for whether that deficient performance prejudiced respondent, the district court recited the Sixth Circuit's test for prejudice in this context ("whether there is a reasonable probability that the petitioner would have pleaded guilty"), Pet. App. 36a, but never specifically ad-

The district court concluded that the remedy should be "specific performance" of the plea deal that respondent would have accepted but for McClain's advice. Pet. App. 40a-41a. Accordingly, the court required the State to offer respondent a sentence agreement of 51 to 85 months or to release him. *Id.* at 42a.

6. The court of appeals affirmed the grant of habeas relief. Pet. App. 1a-22a.

The court of appeals applied a modified version of the two-part *Strickland* test to respondent's ineffective-assistance claim. Pet. App. 12a. First, the court examined whether respondent had demonstrated that McClain's advice to plead not guilty was deficient. Second, the court applied its own precedent regarding prejudice in cases involving forgone guilty pleas and inquired whether respondent had "show[n] a '*reasonable probability* that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer.'" *Ibid.* (quoting *Magana* v. *Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001)). Under that standard, the court concluded, respondent was entitled to habeas relief, whether or not the deferential standard of review under 28 U.S.C. 2254(d)(1) applied. Pet. App. 11a; see also *id.* at 19a & n.4.

a. The court of appeals concluded that McClain was "wrong" in advising respondent that the prosecution could not establish the element of intent because Mundy

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dressed whether respondent had made that showing. See *id.* at 34a-40a. In his habeas petition, respondent averred that he would have accepted the plea offer, although he did not discuss whether the trial court would likely have accepted the plea or what maximum sentence the trial court would have imposed. See Mem. of Law in Supp. of Pet. for Writ of Habeas Corpus 16-17; see also Pet. Br. 5 & n.1 (discussing Michigan sentencing procedure).

was shot below the waist. Pet. App. 13a. The court emphasized that McClain had not just made a poor prediction about a trial's outcome or informed respondent of an incorrect legal rule; rather, he had "focused" on the incorrect rule and advised respondent not to accept the plea deal because he thought a conviction for assault with intent to murder "could not" occur. *Id.* at 14a-15a. That advice, the court concluded, was constitutionally deficient, and the state court was unreasonable in holding the contrary. *Id.* at 15a-16a.

b. The court of appeals rejected the State's argument that respondent had suffered no prejudice because he was convicted at a fair and error-free trial and sentenced accordingly. Pet. App. 17a-19a. In the court's view, respondent had established prejudice by showing that he would have accepted the plea offer but for counsel's advice, *id.* at 16a-17a, and that he ultimately received a sentence "greater than that promised by the plea deal," *id.* at 18a. Thus, the court concluded, respondent "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him." *Id.* at 19a.

c. Finally, the court of appeals concluded that the district court had not abused its discretion in ordering specific performance. The court stated that federal courts have "wide latitude in structuring * * * habeas relief," Pet. App. 20a (citation omitted), and that the relief chosen by the district court "remedies the constitutional violation without unduly infringing upon the state's interests." *Id.* at 21a. The court acknowledged that "there are such interests to be taken into account," though it did not identify them. *Ibid.*

SUMMARY OF ARGUMENT

I. The purpose of the Sixth Amendment right to the effective assistance of counsel is to ensure that the defendant receives a fair trial that reliably determines his guilt or innocence. That purpose is central to this Court's cases defining the elements of an ineffective-assistance claim.

The element at issue here requires a defendant to show prejudice, *i.e.*, a "reasonable probability" that his counsel's deficient performance affected the outcome of the proceeding. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). A defendant must show more than that the attorney's actions were the but-for cause of an unfavorable outcome. This Court has rejected a test of "[s]heer outcome determination"; the defendant has not shown prejudice "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart* v. *Fretwell*, 506 U.S. 364, 370, 372 (1993).

Respondent cannot make the necessary showing. Respondent was convicted after a fair trial, and advice to forgo a guilty plea, including a plea bargain, did not "deprive the defendant of any substantive or procedural right to which the law entitles him." First, a not-guilty plea is merely an *assertion* of the defendant's constitutional right to a trial; unlike a guilty plea, a not-guilty plea does not waive anything and does not produce a conviction. The assertion of rights cannot, by itself, be cognizable prejudice. Second, errors made in plea-bargaining negotiations do not rise to the level of cognizable prejudice: a defendant has no constitutional right to plea-bargain, and even if a bargain is reached, the prosecution and the judge have discretion to reject that bargain before the defendant gains any enforceable enti-

tlement. Third, and relatedly, respondent cannot contend that the sentence he received after his fair trial demonstrates prejudice because it is longer than the sentence he might have received under the plea bargain. The bargain was never adopted by the parties or accepted by the trial court, and the premises on which it would have rested (avoiding the costs and risks of trial, obtaining respondent's cooperation, showing acceptance of responsibility) were eliminated when the case went to trial. Accordingly, respondent cannot show any legal entitlement to be resentenced now in accordance with the bargain he declined in 2003.

II. The absence of any coherent remedy for the Sixth Amendment violation that the court of appeals identified illustrates the flaws in the court's prejudice analysis. Remedies for Sixth Amendment violations must "be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Neither the remedy imposed here, nor any other remedy identified by other courts, intelligibly remedies the injury that the court of appeals identified.

Reversing respondent's conviction would not be a tailored remedy, for a simple reason: guilt has never been in dispute. Respondent was found guilty at an undisputedly fair trial, and his constitutional theory is that he should have pleaded guilty sooner. Setting aside his conviction and requiring the State to retry him does nothing to remedy the constitutional error the court of appeals identified; that disposition will lead only to a windfall (if respondent is acquitted because the passage of time has degraded the State's evidence) or to a wasteful and time-consuming proceeding (a fair trial that duplicates the one respondent already received).

Nor is "specific performance," the remedy ordered below, either appropriate or tailored. Respondent never had a legal entitlement to the sentence proposed in the original plea offer; indeed, if he had accepted the offer he would have had no such entitlement until the court accepted the plea and imposed sentence. Specific performance thus puts him in a better position than if no constitutional violation had occurred.

Imposing the plea agreement on the prosecution years after the fact also contravenes important principles of plea bargaining and the separation of powers. Plea bargaining rests on mutuality of advantage. Plea offers like the one respondent received avoid the uncertainty, expense, and human toll of a trial, and they may secure the defendant's cooperation in other cases. When the facts change, the plea offers change, and the facts of respondent's situation have significantly changed since 2003. Nonetheless, the courts below imposed a remedy that ignores those changed circumstances and gives respondent a substantial *quid* for essentially no *quo*. Imposing that unbalanced remedy improperly denies both the prosecution and the sentencing court their proper roles in deciding what charges to bring and what sentence ultimately to impose.

ARGUMENT

I. A DEFENDANT DOES NOT SUFFER COGNIZABLE PREJUDICE WHEN HE DECLINES TO PLEAD GUILTY AND IS CONVICTED AT A FAIR AND ERROR-FREE TRIAL

A defendant's Sixth Amendment rights are not violated when counsel's advice, however deficient, causes the defendant no cognizable prejudice. *Strickland* v. *Washington*, 466 U.S. 668, 691-696 (1984). The defen-

dant suffers no such prejudice when he rejects a guilty plea that, in hindsight, would have been to his advantage if accepted and entered. If the result of his decision not to waive his rights by pleading guilty is a fair and error-free trial, the Sixth Amendment guarantees no more.[2]

A. Prejudice Requires An Effect On The Trial That Calls Its Fairness Into Question

In *Strickland*, this Court phrased the prejudice inquiry as calling for "a reasonable probability" of a "different * * * outcome." 466 U.S. at 694. But *Strickland*'s test does not mean that *any* difference in probable outcome constitutes prejudice. Rather, the type of prejudice that qualifies is determined by the purpose of *Strickland*'s guarantee: to provide assistance of counsel at trial (or in deciding to waive trial).

1. The purpose of the Sixth Amendment right to counsel is to secure a fair trial

Setting out the test for ineffective assistance of counsel in *Strickland*, this Court began with the well-established principle "that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 684. As the Court has long recognized, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' *at trial*, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S.

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[2] Throughout this brief, references to "trial" broadly include both guilt and sentencing proceedings; counsel's deficient performance may cause prejudice not only at trial, but at other adjudications of guilt (plea hearings) or at sentencing. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52 (1985) (guilty-plea proceeding); *Glover* v. *United States*, 531 U.S. 198 (2001) (sentencing).

648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)) (emphasis added)); see also *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942). Indeed, the proposition that the Constitution requires not just the assistance of counsel, but *effective* assistance, has its origins in the requirement that the criminal trial, the proceeding by which a defendant is deprived of liberty, provide due process of law. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970).

As respondent notes (Br. in Opp. 21), the right to counsel does not begin at trial. But a pretrial proceeding's impact on trial is what determines its coverage by the counsel guarantee. This Court has extended the right to counsel to "pretrial events that might appropriately be considered to be *parts of the trial itself*." *Ash*, 413 U.S. at 310 (emphasis added); accord *Gonzalez-Lopez*, 548 U.S. at 147. At these "'critical' pretrial proceedings, * * * the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (brackets in original; citations and internal quotation marks omitted). Thus, the right to counsel attaches at those stages "where counsel's absence *might derogate from the accused's right to a fair trial*." *United States* v. *Wade*, 388 U.S. 218, 226 (1967) (emphasis added); accord, *e.g.*, *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002).

Respondent thus is incorrect in treating the pretrial right to counsel as a free-standing constitutional norm untethered from the trial process. See Br. in Opp. 20-21.

Rather, as this Court has emphasized, the right to the effective assistance of counsel is "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

2. The Sixth Amendment prejudice standard focuses on the constitutional purpose of preserving trial integrity, not on comparing hypothetical outcomes

Because the right to effective assistance "derive[s] * * * from the purpose of ensuring a fair trial," this Court has explained, "logically enough, * * * the limits of that right [also derive] from that same purpose." *Gonzalez-Lopez*, 548 U.S. at 147; see *Strickland*, 466 U.S. at 686. The "ultimate focus" of the prejudice inquiry, therefore, is on whether the attorney's performance impaired the "fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

a. The central importance of ensuring the reliability of trial proceedings led the Court to adopt the "reasonable probability" standard for showing prejudice. A defendant may establish prejudice under *Strickland* even if he cannot show that the attorney's error more likely than not affected the outcome. 466 U.S. at 694. Rather, the defendant need only "show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* (emphasis added).

That less-than-a-preponderance standard is supported by two reasons that are relevant here. First, ineffective assistance of the sort at issue in *Strickland* "asserts the absence of one of the crucial assurances

that the result of the proceeding is reliable." 466 U.S. at 694. As a result, "finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Ibid.* And second, when ineffective assistance is sufficiently prejudicial to call the result of the proceeding into question, the remedy is a new proceeding, not an imposition of the opposite outcome—*e.g.*, a new trial, not a judgment of acquittal.

Thus, the Court concluded, an ineffective-assistance claim does not focus on showing that the *outcome* was incorrect—which presumably would require at least a preponderance of evidence. See *Strickland*, 466 U.S. at 693-694. Rather, because the focus is on whether "the proceeding itself [was rendered] unfair" and its result "unreliable," the requisite showing is one "sufficient to undermine confidence in the outcome." *Id.* at 694. And as a result, a new trial—with constitutionally effective counsel—provides a complete Sixth Amendment remedy, irrespective of the outcome of that new trial. See, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 389 (1986) (remedy for ineffective assistance is retrial).

b. For similar reasons, *Strickland* prejudice is not established merely by showing that different conduct by the attorney would have produced a different result. *Lockhart* v. *Fretwell*, 506 U.S. 364, 370 (1993) ("[s]heer outcome determination" is not always enough to show Sixth Amendment prejudice). Indeed, in *Fretwell*, raising a particular objection would have produced a sentence of life imprisonment rather than death, *id.* at 376 (Stevens, J., dissenting), but the Court found no *cognizable* prejudice. The Sixth Amendment does not require setting aside a conviction or sentence based on prejudice to "a right the law simply does not recognize." *Id.* at 370 (majority opinion) (citation omitted); *id.* at 375 (O'Con-

nor, J., concurring) (citation omitted). Rather, the difference must reflect a lack of confidence in the reliability of the proceeding.

In *Fretwell*, defense counsel failed to raise an objection, based on a federal appellate decision that was then good law, that would have invalidated the sole aggravating circumstance on which Fretwell's capital sentence rested. Had that aggravator been stricken before the verdict, therefore, Fretwell would have been acquitted of the death penalty. See 506 U.S. at 366-367. Fretwell contended that his lawyer's failure to raise the objection prejudiced him because it resulted in a death sentence—even though the case that the lawyer had failed to cite was subsequently overruled. *Id.* at 368. The Court concluded that Fretwell had shown that "the outcome would have been different but for counsel's error," *id.* at 369-370, but had not shown prejudice under the Sixth Amendment. The result of the trial is not rendered unreliable "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372; see *id.* at 369-372.

Similarly, in *Nix* v. *Whiteside*, 475 U.S. 157 (1986), the defendant argued that he received ineffective assistance because his counsel refused to cooperate in presenting perjured testimony. If the defendant had presented that testimony, there might have been a reasonable probability that the jury would not have returned a guilty verdict. The Court held, however, that "as a matter of law, counsel's conduct * * * cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry." *Id.* at 175.

This Court has since reiterated its understanding that a "likelihood of a different outcome" will not itself

qualify as "legitimate 'prejudice'" because "prejudice" relevant under *Strickland* requires that "'counsel's deficient performance render[] the result of the trial unreliable or the proceeding fundamentally unfair.'" *Williams* v. *Taylor*, 529 U.S. 362, 392, 393 n.17 (2000) (quoting *Fretwell*, 506 U.S. 372). No separate inquiry into fundamental fairness is required once cognizable *Strickland* prejudice is shown. *Id.* at 393; accord *Glover* v. *United States*, 531 U.S. 198, 204 (2001). But a defendant must establish that counsel's deficient performance deprived him of a "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393.

3. Ineffective assistance at a pretrial stage causes prejudice when it affects the reliability of the trial

The foregoing principles apply fully to claims of ineffective assistance before trial. In every case in which this Court has applied the *Strickland* test to claims of pretrial error by counsel (whether committed in or out of court), the claim was that the error in some way affected the trial process or unfairly resulted in a waiver of trial altogether.[3]

This Court's treatment of pretrial ineffective assistance that leads to the entry of a guilty plea well illustrates those principles. When a defendant challenges his guilty plea based on the ineffective assistance of counsel, the defendant must demonstrate a reasonable

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[3] See, *e.g.*, *Premo* v. *Moore*, 131 S. Ct. 733 (2011) (claim that counsel misadvised defendant to plead guilty without first seeking to suppress his confession); *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010) (claim that counsel failed to advise defendant who pleaded guilty about immigration consequences of his guilty-plea conviction); *Bell* v. *Thompson*, 545 U.S. 794 (2005) (claim that counsel failed to determine defendant's mental condition before trial); *Kimmelman*, *supra* (claim that counsel failed to make a pretrial discovery request and suppression motion).

probability that, but for counsel's errors, he would have pleaded not guilty and proceeded to trial. See *Premo* v. *Moore*, 131 S. Ct. 733, 743 (2011); *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). Such an error affects the reliability of the process by which the defendant was convicted: unlike a not-guilty plea, see pp. 17-18, *infra*, a guilty plea is both a conviction and a waiver of the right to trial. The prejudice standard accordingly "closely resemble[s]" the assessment of trial prejudice. *Hill*, 474 U.S. at 59-60.

In other contexts, too, this Court has held that demonstrating a pretrial infringement of the right to counsel requires a showing that the challenged conduct impaired the defendant's right to a fair trial. Thus, for example, the Court has concluded that denial of counsel at a post-indictment lineup does not justify reversing the subsequent conviction if the lineup results are not admitted at trial and any in-court identification by the witness rests on observation of the defendant independent of the lineup. *Wade*, 388 U.S. at 239-240.[4] See also *Kimmelman*, 477 U.S. at 389 (prejudice from failure to file timely pretrial suppression motion derived from challenged evidence's admission at trial and effect on verdict).[5]

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[4] This Court has applied a different rule in the context of the Sixth Amendment "right to be free of uncounseled interrogation," which is violated by the interrogation rather than the admission of evidence, because of counsel's special "'usefulness * * * at th[at] particular [pretrial] proceeding.'" *Kansas* v. *Ventris*, 129 S. Ct. 1841, 1846 (2009) (quoting *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988)) (second brackets in original). Uncounseled interrogation, however, raises unique concerns because of its potential to generate incriminating evidence that will render the trial a formality (or nearly so). See *id.* at 1845; *Massiah* v. *United States*, 377 U.S. 201, 206 (1964).

[5] In instances of complete deprivation of counsel, or counsel laboring under a conflict that actually affected his performance, this Court has

B. A Defendant Who Forgoes A Guilty Plea And Is Convicted At A Fair Trial Suffers No Sixth Amendment Prejudice From Counsel's Performance In Plea Negotiations

Respondent does not dispute that his trial and sentencing proceedings were fair and resulted in no constitutional error. Nor did the court of appeals. Respondent must therefore identify some cognizable prejudice stemming from his decision *not* to plead guilty. That he cannot do. A not-guilty plea is merely an assertion of rights; it does not itself cause any prejudice. And respondent cannot show prejudice merely by comparing the sentence he received to the sentence in the State's plea offer. Even had respondent decided to accept the plea offer, he would have had no legal entitlement to be sentenced in accordance with the agreement, or indeed to enter the contemplated plea. He therefore cannot show prejudice to any "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393; *Fretwell*, 506 U.S. at 372.

1. Respondent contends (Br. in Opp. 19-20) that because deficient advice to enter a *guilty* plea may cause prejudice under the Sixth Amendment, so too may advice to enter a *not-guilty* plea. But the two types of plea have distinct consequences. A guilty plea both waives trial and results in a conviction, and in both respects can lead to the sort of prejudice that this Court described in *Strickland*, *i.e.*, prejudice to the reliability of the proceeding. Neither consequence results from a not-guilty plea.

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presumed that such prejudice exists. *Cronic*, 466 U.S. at 659 & n.25.

The entry of a guilty plea involves the ultimate determination of criminal liability and, in that sense, produces the same results as a guilty verdict after a trial. See *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction."); see also *Mabry* v. *Johnson*, 467 U.S. 504, 507-508 (1984) (guilty pleas implicate the Constitution because they give rise to a conviction and punishment). Because valid guilty pleas waive the right to trial (and other associated rights) and lead automatically to conviction, the Constitution requires that they be knowing and voluntary and that the trial court ensure that those requirements are satisfied. See *Parke* v. *Raley*, 506 U.S. 20, 28-29 (1992); *Boykin*, 395 U.S. at 242; see also, *e.g.*, Fed. R. Crim. P. 11 (setting forth a detailed procedure governing the acceptance of guilty pleas and the concomitant waiver of trial rights).

No equivalent requirements govern not-guilty pleas, because such pleas are not tantamount to conviction and are effective whether or not they are made knowingly and voluntarily. "[A] not-guilty plea is a waiver of nothing; it is an *invocation* of the constitutional right to a trial." *Williams* v. *Jones*, 571 F.3d 1086, 1098 (10th Cir. 2009) (Gorsuch, J., dissenting), cert. denied, 130 S. Ct. 3385 (2010). Such pleas have legal significance only in that they put the government to its proof at a subsequent trial.

2. Nor can respondent show prejudice merely by pointing to deficient advice during plea bargaining that *could* have led to a guilty plea. "[T]here is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Thus, in *Weatherford*, the Court rejected the notion that interference with the attorney's ability to plea-bargain has constitutional signifi-

cance. An undercover agent had attended meetings between Bursey and his lawyer; the court of appeals held that the agent violated Bursey's right to a fair trial in part because the agent lulled Bursey into a false sense of security, depriving him of the opportunity to consider whether plea bargaining might be his best course. See *Bursey* v. *Weatherford*, 528 F.2d 483, 487 (4th Cir. 1975). This Court rejected that holding on the ground that plea-bargaining is not a right protected by the Constitution. 429 U.S. at 561. Respondent here had no "substantive or procedural right" to engage in plea negotiation at all. *Williams*, 529 U.S. at 393; *Fretwell*, 506 U.S. at 372.[6]

3. The court of appeals emphasized that the minimum sentence that respondent actually received after his fair and error-free trial was longer than the minimum sentence contemplated by the plea bargain respondent rejected. But as *Fretwell* illustrates, that bare comparison is insufficient. Even if respondent would have accepted the plea offer had he received better advice, he would have had no entitlement to enter the guilty plea and receive the agreed-upon sentence.

a. Until the offer gives rise to an agreement between the parties and the defendant enters a valid guilty plea pursuant to the agreement's terms, the offer has no legal force. Respondent thus cannot show that, even if he had contacted the prosecutor to accept the offer, the prosecutor necessarily would have gone forward with it;

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[6] In *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court rejected the notion that counsel's failure to secure a plea showed that a conflict of interest had adversely affected his representation (a lesser standard than *Strickland* prejudice, see *id.* at 793), because the prosecutor did not wish to plea-bargain and rebuffed counsel's overtures. See *id.* at 785-786.

nothing in the Constitution would have precluded the prosecutor from withdrawing it. In *Johnson*, *supra*, the prosecutor withdrew his plea offer when defense counsel contacted him to accept the offer. This Court rejected the notion that the withdrawal violated due process, and it explained that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty *or any other constitutionally protected interest.*" 467 U.S. at 507 (emphasis added). Even if the prosecutor was "negligent or otherwise culpable" in withdrawing the plea offer, the Constitution's concern is only "with the manner in which persons are deprived of their liberty." *Id.* at 511.[7] Thus, only the entry of a guilty plea, not the acceptance of a plea offer, implicates substantive or procedural constitutional rights; it is the guilty plea, not the plea offer or agreement, that calls the Constitution into play. *Id.* at 507-508.[8]

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[7] This constitutional principle is well established in Michigan and federal practice as well. See, *e.g.*, *In re Robinson*, 447 N.W.2d 765, 769 (Mich. Ct. App. 1989); *People* v. *Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977) ("[Plea] agreements are not binding upon the prosecutor, in the absence of prejudice to a defendant resulting from reliance thereon, until they receive judicial sanction, [any more] than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea * * * ."); *United States* v. *Springs*, 988 F.2d 746, 749 (7th Cir. 1993).

[8] Even when the prosecution breaches the terms of a plea agreement after entry of a guilty plea, the defendant has no automatic entitlement to specific performance of the agreement, for courts have discretion simply to nullify the agreement instead and to allow the defendant to re-plead. See *Johnson*, 467 U.S. at 510 n.11; *Santobello* v. *New York*, 404 U.S. 257, 262-263 (1971).

b. Furthermore, even if respondent and the prosecutor had agreed that respondent would plead to particular charges and receive a particular minimum sentence, that agreement would not have bound the trial judge. "There is, of course, no absolute right to have a guilty plea accepted." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). In both the Michigan and federal systems, trial judges have express authority to reject plea agreements that set forth a specific sentence or sentencing range. See *People* v. *Williams*, 626 N.W.2d 899, 900 (Mich. 2001); *People* v. *Killebrew*, 330 N.W.2d 834, 838 (Mich. 1982); Fed. R. Crim. P. 11(c)(3)(A). Under those circumstances, the defendant has the opportunity to withdraw the guilty plea—which would have put respondent back in the same situation in which his counsel's advice put him.

c. The speculative nature of both inquiries—whether the prosecutor's offer would have ripened into an agreement, and whether the court would have accepted it—precludes a finding of prejudice. *Strickland* made clear that prejudice cannot be based on "the idiosyncracies of the particular decisionmaker," any more than it could be based on "arbitrariness, whimsy, [or] caprice." 466 U.S. at 695. Under *Strickland*, a defendant cannot show that his attorney's advice caused him prejudice when intervening steps in the chain of causation depend on substantial prosecutorial and judicial discretion.

d. Even if a forgone plea offer could establish cognizable prejudice, respondent here has made no effort to demonstrate as a *factual* matter that the two crucial contingencies would have come out in his favor if he had accepted the plea offer. First, he would have to show that the prosecutor would not have withdrawn the plea

offer before sentencing. Cf. Pet. Br. at 3, *Missouri* v. *Frye*, No. 10-444 (explaining that the defendant subsequently committed another offense and the prosecutor's practice was to withdraw plea offers if the defendant reoffended); *Riggs* v. *Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001) (noting that the particular plea offer was based on a misunderstanding of law and the prosecution might well have realized its error before the plea was entered), aff'd, 399 F.3d 1179, reh'g en banc granted, 430 F.3d 1222 (9th Cir. 2005), appeal dismissed.[9] Second, he would have to show that the trial court would have both accepted the guilty plea and imposed the sentence to which he now claims a legal entitlement. Respondent has made neither of those showings, nor did the courts below even inquire into either of those contingencies.

4. This Court's decision in *Glover*, *supra*, is not to the contrary. *Glover* confirmed that ineffective assistance *at sentencing* is prejudicial if it results in a longer term of imprisonment—even only a few months longer. 531 U.S. at 203-204. But that is because the attorney's error affects the sentencing proceeding itself and thus calls its reliability into question. See *Williams*, 529 U.S. at 393. Glover's attorney failed to challenge a Sentencing Guidelines calculation "which, if it [was] error, would have been correctable on appeal." *Glover*, 531 U.S. at 204. Because at the time the federal Sentencing Guidelines were binding on district courts and "constrained [their] discretion," Glover could show that the calculation error directly affected the sentence. *Ibid.* By contrast, the Court noted, it was *not* holding that a defen-

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[9] Prosecutors also remain able to withdraw from a plea agreement if the defendant breaches the agreement after the plea is entered.

dant could show prejudice simply by asserting that his sentence was increased as a result of other errors at earlier stages before sentencing. *Ibid.* ("This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence.").

Respondent's sentencing proceeding, like his trial, was concededly fair. Indeed, as this Court's previous encounter with the questions presented here illustrates, a constitutional claim like respondent's ignores the fairness of the sentencing proceeding just as it ignores the fairness of the trial: in *Arave* v. *Hoffman*, 552 U.S. 117 (2008) (per curiam), the district court had already awarded Hoffman a new sentencing proceeding and the State had acquiesced in that ruling, but the Ninth Circuit nonetheless held that Hoffman was entitled to reinstatement of a plea agreement he had previously declined. *Id.* at 117-118. Thus, on the view of courts like those below and the Ninth Circuit in *Hoffman*, even an entirely new sentencing with new counsel would not cure the constitutional violation.[10]

Furthermore, unlike Glover, respondent cannot show that his attorney made an error that caused his sentence to increase: the indeterminate sentence respondent ultimately received was based on the convictions obtained after the fair trial and the resulting sentencing-guidelines calculations, which were correct. As shown above, the prosecutor's extension of a plea offer does not establish that respondent would have been *entitled* to the sentencing range reflected in the offer.

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[10] After this Court granted certiorari, Hoffman abandoned his plea-bargaining claim (presumably content to return to state court for resentencing), and this Court vacated the relevant decisions below as moot. 552 U.S. at 118-119.

* * * *

As Judge Gorsuch explained in his dissenting opinion in *Williams*, 571 F.3d at 1105, counsel's error here deprived respondent of an *opportunity* rather than a right—much as if counsel had neglected to make a personal pitch for a lenient sentence recommendation to a prosecutor whom he knew to be routinely receptive to such pitches. In such a scenario, as here, the lawyer's ineptness might potentially have cost his client a more favorable sentence. But "in neither case could the defendant complain that he * * * was deprived of a legal entitlement such that the judgment of conviction was unfair." *Ibid.* Because respondent lost no such legal entitlement when he followed his attorney's advice to plead not guilty, the court of appeals erred in finding prejudice.

II. THE ABSENCE OF ANY COHERENT REMEDY FOR A FORGONE PLEA CONFIRMS THAT RESPONDENT SUFFERED NO SIXTH AMENDMENT PREJUDICE

This Court has held that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The remedy devised by the courts below fails that test. Some courts considering claims like respondent's have vacated the conviction and ordered a new trial.[11] Others, including

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[11] See, *e.g.*, *United States* v. *Gordon*, 156 F.3d 376, 381-382 (2d Cir. 1998); see also *State* v. *Gruber*, 165 P.3d 1185, 1190 (Utah 2007) (citing cases).

the courts below,[12] have (Pet. App. 21a n.5) modified that approach by ordering the conviction invalidated *unless* the prosecution reinstates the same plea offer it originally made.[13] Neither reversal of the conviction, nor compelled reinstatement of a plea offer, nor giving one party the opportunity to choose between them is an appropriate remedy. Indeed, all of the alternative remedies devised by other courts suffer from similar flaws. The inability to develop an appropriately tailored remedy underscores those courts' error in identifying a Sixth Amendment violation in the first place.[14]

A. A Remedy That Vacates The Conviction Is Not Tailored To The Purported Sixth Amendment Violation

Respondent was found guilty after a fair trial. He now contends that he should have pleaded guilty sooner and thus obtained a shorter sentence. Plainly, therefore, any remedy that upsets the finding of respondent's guilt has nothing to do with respondent's constitutional claim. That form of relief is not a valid remedy, because they put the defendant in a *better* position than if he had never received the deficient advice.

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[12] See, *e.g.*, *Hoffman* v. *Arave*, 455 F.3d 926, 942-943 (9th Cir. 2006), vacated in part as moot, 552 U.S. 117 (2008); *State* v. *Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea offer).

[13] The court below left open the possibility that it would have allowed the State to offer a plea deal, not necessarily *the same* plea deal; if the State had complied but respondent had declined, presumably a new trial would have ensued. The State did not ask for that form of relief.

[14] In its orders granting certiorari in this case and *Frye*, the Court directed the parties to brief the question "[w]hat remedy, *if any*, should be provided." 131 S. Ct. 856 (2011) (emphasis added); accord *Arave* v. *Hoffman*, 552 U.S. 1008 (2007) (same).

In the ordinary ineffective-assistance case, in which the defendant is deprived of a fair trial because of his lawyer's deficient performance, the remedy of a new trial (which includes a new opportunity to plead guilty) properly redresses the constitutional violation. By contrast, the remedy of retrial makes no sense in the circumstances here: respondent contends that he would have pleaded guilty, but for counsel's deficient advice, and he subsequently was found guilty. Making such a defendant whole cannot entail allowing him to walk free unless the prosecution proves guilt all over again, for several reasons.

First, that remedy gives the defendant the advantage of time: as this Court has recognized, over time important witnesses die, disappear, or become unavailable, or their memories fade. See *Premo*, 131 S. Ct. at 745-746; accord, *e.g.*, *Boria* v. *Keane*, 99 F.3d 492, 499 (2d Cir. 1996) (rejecting new-trial remedy for this reason), cert. denied, 521 U.S. 1118 (1997). Conferring that advantage may be necessary where the initial conviction rested on constitutional error, but quite another where the conviction was obtained at a fair trial. Any retrial will result in either acquittal—a windfall for a defendant who claims that he was deprived of the chance to plead guilty, cf. *Fretwell*, 506 U.S. at 370—or conviction—a pointless waste of resources that makes the proceedings no more reliable. See *Williams*, 571 F.3d at 1110 (Gorsuch, J., dissenting) ("If a fair trial is the right remedy, then in a real sense [the defendant has] already received it.").

Second, if convicted again, the defendant may actually receive a *more* severe sentence. If the claim of prejudice rests purely on comparing the sentence imposed at trial to the plea offer, then resentencing arguably

does not cure such prejudice (as the Ninth Circuit thought in *Hoffman*, see p. 23, *supra*).

Nor is the new-trial remedy warranted to encourage the State to again offer a plea bargain, perhaps the original one. The flaw in this approach is the impossibility, especially after a trial has been held, of restoring the *status quo ante*. See *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) ("Courts 'cannot recreate the balance of risks and incentives on both sides that existed prior to trial * * * .'") (quoting *Commonwealth* v. *Mahar*, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)). The parties' incentives to offer or accept a particular bargain will have been reshaped by the passage of time and the experience and expense of having already been through trial, conviction, and sentencing. The parties will have more information about the likely outcome of trial and the likely sentence if the defendant is convicted at trial. And the government's incentives to avoid trial may have changed for other reasons as well: prosecutors commonly extend plea offers that require the defendant's cooperation in an investigation or separate prosecution, which may have already ended by the time the parties are ordered back to the negotiating table. Because the *status quo ante* cannot be restored, the result in many cases will be either that no bargain is reached and the case is retried, or that the parties reach a bargain less favorable than the one the defendant previously declined. Neither outcome justifies upsetting the conviction to prompt new negotiations as a purported cure for an attorney's previous failure to obtain a better bargain.

B. A Remedy That Imposes The Terms Of A Past Plea Offer Is Contrary To Principles Of Plea Bargaining And Separation Of Powers

Recognizing the unsuitability here of the standard remedy for ineffective-assistance claims—a fair trial—courts have improvised other remedies, but these are likewise unsatisfactory. Some courts, including both federal courts below, have required the prosecution to offer the defendant the same plea bargain that he would have accepted but for his attorney's deficient performance. Affording a defendant the benefits of the rejected plea offer creates serious problems, both legal and practical.

First, this approach overlooks the "critical difference between an entitlement and a mere hope or expectation" that the defendant might ultimately realize an accepted plea offer's benefits. *Johnson*, 467 U.S. at 507 n.5. As discussed above, a plea offer is without legal force until it is embodied in a guilty plea. Accordingly, even if respondent had accepted the offer, the prosecutor would have been free to withdraw it and the trial judge free to reject it. See pp. 19-21, *supra*. Thus, instead of restoring the defendant to his original position, the remedy of specific performance awards him with something he never had: a legal entitlement to the benefits of the offer. Indeed, he would have had no such entitlement if he had *accepted* the plea—the judge could have rejected it or the prosecution could have withdrawn the offer before the plea was tendered to the court. The remedy thus anomalously places the defendant who *rejects* a plea offer because of his attorney's blunder in a better position than the defendant who *accepts* the offer subject to possible withdrawal by the prosecution or rejection by the court.

Second, the reinstatement remedy is unfairly one-sided and contrary to the purpose of plea bargaining. As this Court has explained, the essence of plea bargaining is "mutuality of advantage." *Brady* v. *United States*, 397 U.S. 742, 752 (1970). The defendant gains leniency; the prosecution avoids a trial, allowing it to conserve resources and eliminate uncertainty. *E.g.*, *ibid.*; *United States* v. *Goodwin*, 457 U.S. 368, 379-380 (1982). Awarding a defendant the benefits of a past plea offer, long after trial, conviction, and sentencing, upsets the mutuality of advantage. The government's plea offer presumably was based on the anticipated benefit of avoiding a trial. Once a trial has taken place, that benefit to the government is gone.[15] The defendant, on the other hand, gets an undeserved windfall—both a trial at which he had the chance to win an acquittal, and the benefits of a plea offer that had been predicated on the avoidance of a trial.

Third, and relatedly, this approach perversely encourages sandbagging. "So long as a defendant can claim his lawyer mishandled a plea offer, he can take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Williams*, 571 F.3d at 1094 (Gorsuch, J., dissenting). Accepting that notion could cause prosecutors to hesitate before offering a plea agreement, concerned that any sentence being offered would be the sentence that a postconviction court would ultimately impose if the defendant showed that his counsel gave him deficient advice. Indeed, in theory *any* pretrial guilty plea—even without a plea agreement—might have resulted in a

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[15] As noted above, any benefit to be gained from the defendant's cooperation in other proceedings will likely have dissipated as well.

more lenient sentence than the one imposed after a trial. See, *e.g.*, Sentencing Guidelines § 3E1.1(a) & comment. (n.3). Accordingly, even if no plea agreement is ever offered, *any* defendant might have an incentive to argue that he was prejudiced by pretrial advice that led him not to plead guilty, and demand an appropriate sentence reduction.

Fourth, the remedy contravenes separation-of-powers principles.[16] In the federal system, the Executive Branch "retain[s] 'broad discretion' to enforce the Nation's criminal laws." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted); *United States* v. *Cox*, 342 F.2d 167, 171-172 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); *id.* at 190-193 (Wisdom, J., concurring specially). Like the decisions whether to prosecute and what charges to bring, the decisions whether to engage in plea bargaining and the sort of deal to offer belong solely to the Executive. Although a trial court has authority to reject certain types of plea agreements, it cannot compel the prosecutor to plea-bargain nor dictate the terms of any deal. See, *e.g.*, *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980); accord, *e.g.*, *People* v. *Heiler*, 262 N.W.2d 890, 893, 895-896 (Mich. Ct. App. 1977) (same, under Michigan's "constitutional separation of powers").[17]

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[16] Although a federal court reviewing a state conviction on habeas may not be bound by state separation-of-powers principles, it would be unusual for a federal court in enforcing the Sixth Amendment (which, in pertinent part, applies identically to federal and state governments) to order a remedy against a state government that would contravene the *federal* separation of powers if employed against the United States.

[17] Indeed, both federal and Michigan judges are barred from any role in plea negotiations. See Fed. R. Crim. P. 11(e)(1); *People* v. *Mathis*,

Requiring that the State renew its previous plea offer, as the courts below did, violates those principles because it imposes on the prosecution a plea deal to which it never gave final agreement and which it would no longer voluntarily offer, given the changed circumstances. As the Third Circuit has explained, "binding the prosecutor to his original plea [offer] * * * interfere[s] with his discretionary functions, *i.e.*, determining what he feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364.

Indeed, in some cases specific performance of the plea agreement would override the prosecutor's discretion not just over plea-bargaining, but over charging decisions. In some cases, the sentence contemplated by the plea agreement cannot lawfully be imposed for the count of conviction, *e.g.*, if a mandatory-minimum statute precludes it. See *Williams*, 571 F.3d at 1088. Where a plea agreement would have involved charging a lesser offense than the one ultimately reflected in the conviction, specific performance of that agreement requires dismissing one count and charging a new one—requiring judicial assumption of a strictly executive function. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Frye* v. *State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), cert. granted, 131 S. Ct. 856 (2011).

Finally, to the extent that the reinstatement remedy requires the State not just to offer the original bargain again, but actually to resentence the defendant in accordance with those terms, that remedy improperly allows the posteonviction court to override the sentencing discretion of the trial court. See also, *e.g.*, *Boria*, 99 F.3d

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285 N.W.2d 414, 416 (Mich. Ct. App. 1979).

at 499 (on habeas review, leaving state conviction intact but ordering the defendant released because he had already served more time than the plea bargain would have permitted). Absent the attorney's deficient advice, the trial court plainly would be empowered to impose a higher sentence, which likely would involve rejecting the plea agreement, allowing the defendant to withdraw the guilty plea, see Fed. R. Crim. P. 11(c)(5), and proceeding to trial.

* * * *

The inability to identify any appropriate remedy for the Sixth Amendment violation that the court of appeals identified flows from the conceptual difficulties inherent in the notion that a forgone guilty plea may cause Sixth Amendment prejudice. "[E]xamination of the remedial question * * * serves only to underscore one thing: the absence of anything in need of remedying in the first place." *Williams*, 571 F.3d at 1109 (Gorsuch, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 2011

AMICUS CURIAE BRIEF

Nos. 10-209 and 10-444

In the Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

STATE OF MISSOURI,

Petitioner,

v.

GALIN EDWARD FRYE,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and to the Court of Appeals of Missouri (Western District)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Where defense counsel's deficient performance causes the defendant to lose the benefit of a favorable plea agreement that the defendant would have accepted had he been competently advised, has the defendant been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTEREST OF THE ABA AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Respondents. The ABA requests that the Court consider the consensus views embodied in the ABA ethical rules and criminal justice standards in deciding whether a criminal defendant is entitled to a remedy where his lawyer's constitutionally deficient performance causes him to lose the benefit of a favorable plea proposal.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by "[p]romot[ing] competence, ethical conduct and professionalism."[3] One of these efforts is the development and adoption of professional standards to serve as models for the regulation of lawyers by the individual states. Its first standards, the CANONS OF PROFESSIONAL ETHICS, were adopted in 1908, and have been continuously amended and updated over the years. They are now published as the ABA MODEL RULES OF PROFESSIONAL CONDUCT.[4]

Another of these efforts has been the development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and refined over the last forty years, the Standards represent a considered collection of "best practices" based on the consensus views of a broad array of professionals involved in the

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[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA MODEL RULES OF PROFESSIONAL CONDUCT are developed through the efforts of ABA members and national, state and local bar organizations, and are subjected to review by academicians, practicing lawyers and the judiciary. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates (HOD), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

criminal justice system.[5] The Standards do not purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable."). As relevant to the cases before the Court, the Standards require criminal defense counsel to promptly communicate any plea offer to the client, and to provide the full and accurate advice necessary to permit the client to make an informed decision regarding any plea offer. The Standards also provide that, on finding that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective assistance of counsel, the court should have broad discretion in fashioning a remedy that will place the defendant insofar as possible in the position he or

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[5] The ABA CRIMINAL JUSTICE STANDARDS are developed through the work of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. They, too, must be approved by vote of the ABA HOD before they become official ABA policy. A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at http://www.americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated).

she would have been in had the constitutional violation not occurred.

SUMMARY OF ARGUMENT

This Court has recognized that American Bar Association standards are valuable measures of prevailing professional norms of effective representation for purposes of the Sixth Amendment. A lawyer's duties under the ABA ethical standards include providing competent representation to a client and communicating with the client concerning matters of significance to the client. These duties are particularly important when a criminal defendant is considering entering into an agreement to plead guilty. As elaborated in the ABA criminal justice standards, the lawyer's duties at the plea stage include promptly informing the client of all significant plea proposals made by the prosecutor, and fully explaining the choices available to the client after conducting an investigation and analysis of all pertinent issues of fact and law. When defense counsel fails to convey a plea offer to the client, or gives the client considering a guilty plea materially inaccurate advice about the charges and the burden of proof, defense counsel's performance falls below the established standard of reasonableness.

Where the accused has been denied the effective assistance of counsel because of deficient representation in the plea process, a subsequent fair trial does not remedy the initial constitutional error. In those rare cases where a defendant loses the benefit of an advantageous plea because of constitutionally ineffective counsel, the court should have discretion to fashion a remedy that will place the defendant insofar

as possible in the position he or she would have been in had the right to effective assistance not been violated. The fact that nearly 95% of criminal convictions now result from guilty pleas makes it all the more important that defendants considering a guilty plea should have competent counsel. In some cases, the circumstances will dictate that the appropriate remedy for a constitutional violation is to vacate the conviction and allow the government to re-prosecute the case. In this event, the government may choose to reopen plea negotiations. In other cases, including where re-prosecution is not feasible, the appropriate remedy may be to afford the defendant the benefit of the offer lost through constitutionally deficient counsel.

ARGUMENT

I. PLEA NEGOTIATIONS ARE A CRITICAL STAGE OF THE CRIMINAL PROCESS IN WHICH A DEFENDANT MUST HAVE COMPETENT COUNSEL.

A. ABA Standards Emphasize the Importance of Competent Counsel at the Plea Stage.

A lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations, is recognized in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("Model Rules" or "R.") and elaborated in the ABA STANDARDS FOR CRIMINAL JUSTICE. Under the Model Rules – and as this Court has long recognized, *see, e.g., Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) – the decision to plead guilty is considered so vital that it is specifically identified as one of the very few that cannot be made by the lawyer

alone. *See* R. 1.2(a) (a lawyer "must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"); *see also* R. 1.4(a)(1) (a lawyer must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules");[6] R 1.4(b) (a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions"); *accord* Standard 4-5.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993) (hereinafter "Defense Function Standards")[7] (the decision whether to plead and what plea agreement to accept are "ultimately for the accused . . . after full consultation with counsel.").[8] Model Rule 1.2(a) and Defense Function Standard 4-5.2(a) give effect to an accused individual's right to make decisions regarding matters that are "fundamental" or "substantive" because they are highly personal and derive from constitutional guarantees. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (decisions about fundamental

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[6] The first example in the commentary to Rule 1.4 of this duty to inform the client is that "a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance." R. 1.4, cmt. 2.

[7] Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, only the Defense Function Standards are discussed in this brief.

[8] The commentary to Defense Function Standard 4-5.2 explains that "because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself."

matters, including decision to plead guilty, are reserved for the defendant).

Defense counsel's failure to communicate a plea offer, and to fully and accurately explain the choices facing the client at this critical stage of the case, effectively deprives the client of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. *See* Standard 14-3.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d. ed. 1999) (hereinafter "Pleas of Guilty Standards") (defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney"); *see also* Defense Function Standard 4-6.2(b) (counsel should "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor").[9] The ABA Criminal Justice Standards have contained

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[9] The commentary to Defense Function Standard 4-6.2 explains that:

> Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide on prosecution proposals, even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.

Defense Function Standard 4-6.2(b) cmt.

these requirements for more than thirty years,[10] and they have been cited by numerous courts both before and after *Strickland* as establishing the norm of effective representation in the guilty plea context.[11]

ABA standards also require that a lawyer must fully explain and advise about the choices available to the client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent

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[10] *See* Standard 4-6.2(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION (2d ed. 1979); *see also* Standards 14-3.2(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (2d ed. 1979). The ethical duty to convey and advise about a plea offer was also contained in the 1969 MODEL CODE OF PROFESSIONAL RESPONSIBILITY that antedated the Model Rules. *See, e.g.*, Ethical Consideration 7-7 ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken"); *see also State v. James*, 739 P.2d 1161, 1166-67 (Wash. Ct. App. 1987); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984).

[11] *See, e.g., Davie v. State*, 675 S.E.2d 416, 420 (S.C. 2009); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006); *People v. Perry*, 68 P.3d 472, 477 (Colo. Ct. App. 2002); *State v. Donald*, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); *Cottle v. State*, 733 So. 2d 963, 964-65 (Fla. 1999); *Becton v. Hun*, 516 S.E.2d 762, 766 (W. Va. 1999); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. Sup. Ct. 1987); *Lloyd v. State*, 373 S.E.2d 1, 2-3 (Ga. 1988); *James*, 739 P.2d at 1166-67; *Johnson v. Duckworth*, 793 F.2d 898, 901-902 (7th Cir. 1986); *Hanzelka*, 682 S.W.2d at 387; *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); *People v. Ferguson*, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); *Lyles v. State*, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978).

issues of fact and law. Pleas of Guilty Standard 14-3.2(b) provides that "to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision." The commentary to this Standard explains that "[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests." *See also* commentary to Defense Function Standard 4-6.1(b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial."). The commentary to Pleas of Guilty Standard 14-3.2 contrasts defense counsel's advisory role with that of the court:

> Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . ., this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for

> example, the probability of conviction in the event of trial.

Pleas of Guilty Standard 14-3.2 cmt. The Pleas of Guilty Standards also caution the court not to accept a plea "where it appears the defendant has not had the effective assistance of counsel." *See* Pleas of Guilty Standard 14-1.4(d).[12] All of the Standards discussed above were in effect and reflected well-established norms many years before the defense attorneys' actions in these cases. *Compare Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009) (per curiam).[13]

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[12] The commentary to Pleas of Guilty Standard 14-1.4 notes that a similar provision was contained in the UNIFORM RULES OF CRIMINAL PROCEDURE, promulgated in 1987. *See* UNIF. R. CRIM. P. 444(b)(2) (1987) (a court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.").

[13] In *Bobby*, in considering whether counsel's performance fell "below an objective standard of reasonableness" in light of "prevailing professional norms," the Court distinguished the detailed 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES ("2003 ABA Guidelines"), promulgated in 2003 long after the defendant's trial, from the more general ABA standard in effect in 1985. *See* 130 S. Ct. at 17 (quoting from the ABA STANDARDS FOR THE DEFENSE FUNCTION (2d ed. 1979)). The Court criticized the court of appeals for interpreting the 2003 ABA Guidelines as "inexorable commands," as opposed to "'only guides' to what reasonableness means," *id.*, and reserved the possibility that it might "accept the legitimacy" of a less detailed set of guidelines that did not "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 17 n.1. As argued *infra*, the specific ways in which counsel's performance in these

B. This Court's Recent Sixth Amendment Jurisprudence Recognizes the Importance of Competent Counsel at the Plea Stage.

This Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1482, *citing Hill v. Lockhart*, 474 U.S. 52, 57 (1985), and *McMann v. Richardson*, 397 U.S. 759, 770–771 (1970). Until recently, however, a criminal defendant was protected in the plea negotiation process only against threats, misrepresentations, and bribes;[14] broken promises;[15] and a failure to disclose the "direct" or court-imposed consequences of conviction.[16] Counsel was expected to do no more than provide competent advice about the rights a defendant was forgoing by entering a guilty plea.[17] In *Padilla*, this Court

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two cases is claimed to have fallen short of an objective standard of reasonableness can in no way be described as "tactical decisions." *See infra*, Part II.A.

[14] *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing with approval *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)).

[15] *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

[16] *Brady*, 397 U.S. at 755.

[17] *McMann*, 397 U.S. at 769-71; *see also Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea

recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle. In holding that a lawyer should have affirmatively advised his client about the deportation consequences of pleading guilty, the *Padilla* Court noted that plea negotiation has become the predominant way of resolving criminal cases. 130 S. Ct. at 1485 n.13 (noting that nearly 95% of criminal convictions result from pleas).[18] The overwhelming reliance on disposition by plea in today's justice system has made it essential that defendants considering a guilty plea should not be "left to the 'mercies of incompetent

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would forgo."); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 29 CAL. L. REV. __ (forthcoming), University of Pennsylvania Public Law and Legal Theory Research Paper Series 40, available at http://ssrn.com/abstract=1694111 ("Plea bargaining, [the Court] assumed, was sufficiently protected by the option of going to trial and by plea colloquies that explained the trial procedures defendants were waiving.").

[18] More recent studies confirm the 2003 data cited by the Court in *Padilla*. *See* Bureau of Justice Statistics Bulletin, May 2010, NCJ 228944 (reporting that in 2006, in state courts in the nation's 75 largest counties, 68% of felony defendants were eventually convicted, and 95% of those convictions were by a guilty plea); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) ("only a small fraction of . . . cases actually proceed to trial," noting the 5% figure provided in the Brief for Law Professors as *Amici Curiae* 7-8); Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 30 ST. LOUIS PUB. L. REV. __ (2011) (forthcoming, available from the ABA) (plea bargaining is "no longer a negligible exception to the norm of trials; it is the norm").

counsel.'" *Id.* at 1486, *quoting McMann*, 397 U.S. at 771.[19]

At the same time, this Court has been understandably reluctant to second-guess strategic decisions made by counsel in the plea bargaining process. In *Premo v. Moore*, 131 S. Ct. 733, 741 (2011), the Court observed that plea agreements are "the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Thus, the Court concluded that the substantive standard for reviewing counsel's strategic choices must be whether there was "manifest deficiency in light of information then available to counsel." *Id.*

In the cases presently before the Court, however, the claimed deficiency in counsel's performance did not involve a strategic choice that turned out badly for the client. Rather, as discussed in the following section, the failure to convey a plea offer and the provision of plainly erroneous advice about the charges and standard of proof, like *Padilla*'s failure to warn about deportation consequences, fell below "an objective

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[19] Professor Ronald Wright has concluded, based on a study of plea and conviction statistics across the second half of the twentieth century, that federal defendants who would otherwise have been acquitted at trial have increasingly pleaded guilty instead. He attributes this in substantial part to increased prosecutorial power, and prosecutors' ability to threaten large penalties for going to trial and to promise large rewards for pleading guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005).

standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 688.

II. WHERE DEFENSE COUNSEL'S FAILURE TO CONVEY A PLEA OFFER OR ERRONEOUS ADVICE ABOUT LEGAL STANDARDS CAUSES THE CLIENT TO LOSE THE BENEFIT OF A FAVORABLE PLEA, COUNSEL'S PERFORMANCE SHOULD BE DEEMED CONSTITUTIONALLY DEFICIENT.

A. A Lawyer is Required Under Applicable Professional Norms to Communicate With the Client About a Plea Proposal, and to Advise the Client Competently Respecting the Proposal.

A lawyer's professional obligation to represent a client competently and diligently, and to communicate with the client about significant developments in the case, has been part of the American Bar Association's ethical canons for over a century.[20] These ethical

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[20] *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), EC 7-4 through 7-7; ABA CANONS OF PROFESSIONAL ETHICS, Canon 8 (1908). As relevant here, Canon 8 provided:

> A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever

duties, which form the basis for rules governing the professional conduct of lawyers in almost every state, have a particular relevance in the context of plea discussions. As discussed in Part I, these rules, together with the ABA CRIMINAL JUSTICE STANDARDS, require that a lawyer communicate with the client about plea offers and advise the client candidly and competently in order to enable the client to make an informed decision respecting the plea. *See also* Defense Function Standard 4-4.1(a) (defense counsel is obligated to investigate "facts relevant to the merits of the case and the penalty in the event of conviction"); Defense Function Standard 4-5.1(a) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.").

In the instant cases, the findings of the lower courts respecting defense counsel's performance amply demonstrate deficient performance when measured against the standards of professional competence discussed above. In No. 10-444, counsel was found to have failed completely to communicate to his client an evidently advantageous plea offer, contrary to ABA Model Rules 1.2(a) and 1.4(b), and Defense Function Standards 4-5.2(a) and 4-6.2(b). In No. 10-209, defense counsel was found to have failed to provide his client considering a guilty plea offer with accurate advice about the elements of the charges and the burden of proof, in violation of ABA Model Rules 1.1 and 1.4(b), Defense Function Standards 4-4.1(a), 4-5.1(a) and 4-

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the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

6.1(b), and Pleas of Guilty Standard 14-3.2(b). These deficiencies were not related to strategic choices by counsel, but were failures to comply with clearly stated and generally accepted objective standards of professional competence. *Cf. Premo*, 131 S. Ct. at 741. That is, these are not cases in which the deficiencies in counsel's action can be defended as a tactical decision or where deference should otherwise have been accorded to counsel's judgment. *See Strickland*, 466 U.S. at 689.

B. Where Deficient Performance Causes a Defendant to Lose the Benefit of a Favorable Plea Proposal, the Defendant Has Been Prejudiced, and Thus Deprived of the Effective Assistance of Counsel to Which the Sixth Amendment Entitles Him.

1. The prejudice analysis in *Hill v. Lockhart* is inapposite where a defendant does not take a plea offer because of deficient counsel.

Prejudice is established for purposes of the Sixth Amendment where there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 691; *accord Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Petitioners and the United States as *amicus curiae* in support of Petitioners have argued that the formulation of the prejudice standard in *Hill* altered the *Strickland* test whenever ineffective assistance is alleged during the plea process, so that a defendant must show that but for his counsel's deficient performance he "would have pleaded not guilty and insisted on going to trial." *See Hill*, 474

U.S. at 59. By this reasoning, a defendant who rejects a plea offer and goes to trial can never meet the constitutional test of ineffective assistance regarding anything that occurred during the negotiation stage. Nor, presumably, can a defendant who subsequently accepts a less favorable plea offer, since he too will be unable to show that, but for his counsel's default, he "would have pleaded not guilty." *See id.*

Rather than *Hill* changing *Strickland*'s prejudice standard, however, the language on which Petitioners rely ("would have . . . insisted on going to trial") simply spells out what the defendant in *that* case needed to show to establish prejudice in the plea process, since he had in fact accepted a plea offer and therefore had given up his right to go to trial. The prejudice test in *Hill*, a case involving counsel's failure to warn about parole eligibility, "focuse[d] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*; *see also Padilla*, 130 S. Ct at 1485 ("to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L. J. 693, 712-719 (2011) (arguing that *Padilla* marks a rejection of a trial-outcome test of prejudice for ineffective assistance in the plea process).

These cases are distinguishable from *Premo v. Moore*, *supra*, where this Court noted the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt "if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and

advice leading to the plea took place." 131 S. Ct. at 741. In *Premo*, the Court concluded that counsel's failure to seek suppression of the defendant's confession before discussing a plea could reasonably be considered a "strategic" choice that courts should be reluctant to second-guess. *Id.* at 743. By contrast, a complete failure to convey an advantageous plea offer (No. 10-444) and plainly erroneous advice about the standard for proving guilt (No. 10-209) do not involve any "facts and circumstances not apparent to a competent attorney," and could not conceivably be considered part of a reasonable defense strategy.

2. The fact that respondents were ultimately convicted and sentenced pursuant to constitutionally adequate procedures does not nullify the prejudice that infected the earlier plea stage.

If Sixth Amendment prejudice can be established only where a defendant does not go to trial, then a defendant who goes to trial (or who accepts a less favorable plea offer) would be foreclosed from claiming ineffective assistance at an earlier stage of the case. But a constitutional violation in the pre-trial stages of a criminal case is not shielded from review simply because the trial portion of the case proceeds without additional error. For example, this Court held in *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1977), that ineffective assistance of counsel in relation to pre-trial investigation and in failing to file a motion to suppress evidence can itself require relief, even if the resulting trial is otherwise basically fair and counsel's performance is otherwise unobjectionable. This Court has recently reaffirmed the principle that even though

the purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011). If the defendant's Sixth Amendment rights are violated, "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.*

In the present cases, the courts below found that if respondents had been properly advised of the existence and import of the plea offers, they would have accepted them, so that the further "constitutionally adequate" proceedings would not have occurred. While a finding of prejudice in this context does not settle the question of appropriate remedy,[21] deficient representation at the plea stage is not vitiated simply because later proceedings in the case were free from additional taint.

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[21] The Solicitor General argues in support of Petitioners that "the absence of any coherent remedy for a forgone plea confirms that respondent suffered no Sixth Amendment prejudice." *See* Brief for the United States as *Amicus Curiae* at 24, 32. But this odd inversion of the equitable principle "*ubi jus ibi remedium*" takes no account of the many courts that have over the years found a way to fashion remedies for constitutional violations at the pretrial stages of a case. *See, e.g.*, David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011), and cases cited *infra* at p. 24. The fact that this exercise is sometimes difficult and the result usually imperfect, as the Missouri court in 10-444 acknowledged, *Frye v. State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), should not be a reason for abandoning the effort altogether, much less for concluding, as the Solicitor General recommends, that there has been no violation at all. The Missouri court specifically rejected a similar argument, noting that "[w]e do not believe the determination of prejudice can be bootstrapped in this fashion." *Id.*

III. A POST-CONVICTION COURT SHOULD HAVE BROAD DISCRETION TO FASHION A REMEDY WHERE A DEFENDANT LOSES THE BENEFIT OF AN ADVANTAGEOUS PLEA BECAUSE OF CONSTITUTIONALLY INEFFECTIVE COUNSEL.

Longstanding ABA policy provides that where a court determines in post-conviction proceedings that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective counsel, the court should have broad discretion to fashion a remedy. *See* Standard 22-2.1 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES (2d ed. 1978) (hereinafter "Post-Conviction Remedies Standards") ("[a] post-conviction proceeding should be sufficiently broad to provide relief [for meritorious claims] that the conviction was obtained or sentence imposed in violation of the Constitution"). Post-Conviction Remedies Standard 22-4.7(a)(ii) identifies the kinds of relief a post-conviction court should be able to order when it finds error "in the trial or pretrial stages of the process leading to conviction," noting that "the kind of affirmative relief ordered will vary with the nature of the meritorious contention." Post-Conviction Remedies Standard 22-4.7(a)(ii) specifies that if further prosecution is foreclosed, "the order of the court should provide for immediate discharge from custody." *Id.* If there is no bar to further prosecution,

> the order of the court should provide for discharge from custody within a stated period of time unless, within that time, the state takes the necessary steps to commit the applicant to

> custody pending reindictment, rearraignment, retrial, or resentence, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required.

Id. Under these Standards, a defendant who has been harmed by constitutionally deficient counsel in pre-trial proceedings should be placed insofar as possible in the position he or she would have been in had the constitutional violation not occurred. *See also* Pleas of Guilty Standard 14-2.1(b)(i)(A) (a defendant denied effective assistance of counsel at the plea stage should be permitted to withdraw a plea even after a criminal sentence has been imposed).

Consistent with this Court's general instruction that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 449 U.S. 361, 364 (1981), the courts have fashioned a variety of remedies where a defendant has been prejudiced by counsel's deficient performance by counsel at the plea negotiation stage. In some cases where a constitutional violation caused the defendant to forego a favorable plea offer, the court has vacated the conviction and given the government an opportunity to re-prosecute the case. *See* Perez, *supra*, 120 YALE L.J. at 1554-60. In other cases, particularly where re-prosecution is impracticable or inappropriate, the court has declined to vacate the conviction and ordered a remedy sometimes styled as "specific performance" of the lost plea deal. *Id.* at 1548-50. The court in No. 10-444 appears to have elected the first approach, while the court in No. 10-209 chose the second. Each court appears to have fashioned a remedy reasonably calculated to place the

defendant insofar as possible in the position he would have been in had the right to effective assistance not been violated.

The key to the question of remedy in cases where a defendant has lost the benefit of a favorable plea offer because of counsel's deficient performance, the ABA suggests, is to recognize that the purpose of plea negotiations is for "the defense and prosecution to reach agreements that . . . satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486. The prevalence of plea bargaining in today's justice system guarantees that almost every criminal prosecution is susceptible to more than one mutually acceptable outcome. Similarly, the role of the post-conviction court in fashioning a remedy for constitutional violations in the plea process should be to approximate a just outcome in light of present circumstances. This may include consideration of a plea agreement that was on the table (but not communicated or adequately explained to the defendant) or modifications that were reasonably probable through further negotiation. Where a court concludes that it is impracticable for the government to retry the case, a remedy may be one that approximates the probable outcome had there been no constitutional violation.

The remedy should be one reasonably calculated to leave the defendant no worse off – but not necessarily better off – than he would have been had counsel performed effectively in the first place. Since the State bears responsibility under the Sixth and Fourteenth Amendments for ensuring that each defendant enjoys effective assistance of counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980), any prejudice to the State from undoing a constitutional harm of this kind is

simply an inevitable cost, once the constitutional harm is identified, of compliance with the Constitution that should be given little weight.

Petitioner in No. 10-209 contends that providing a remedy for Sixth Amendment violations resulting in the loss of an advantageous plea "allows a defendant to play with house money." Brief for Petitioner Lafler at 20. This colorful but cynical description of how a defendant can "take his chances at a fair trial" and still "demand and receive the benefit of the forgone plea," would require that defense lawyers collude with their clients to "game the system," and assumes that courts cannot detect and punish any such unethical conduct if it should occur. Petitioner in No. 10-444 similarly warns that affirming the state court's judgment will encourage lawyers to engage in unethical conduct: *e.g.*, "a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." Brief for Petitioner State of Missouri at 36.

This Court should reject Petitioners' invitation to base a constitutional rule on an assumption that members of the Bar will choose to violate their own ethical responsibilities and their states' rules of professional conduct. In doing so, counsel would first impose on the judicial system, their clients and themselves the increased costs and risks of going to trial, following which they would either have to commit perjury at the post-conviction hearing – if one were granted, which it seldom is – or confess at such a hearing to conduct that would warrant the imposition

of professional discipline.[22] *See* Model Rules, R. 1.4(a)(1); R. 3.3(a) (a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal").

Further, a court considering whether counsel had performed to the required standard would weigh the testimony of those involved as it would weigh the testimony of any witness. And the court would consider the interest that any or all of them have in the outcome of such proceedings. *See, e.g., United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992). Several federal circuits have long conducted such proceedings. *See, e.g., Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *Day*, 969 F.2d at 47; *Blaylock*, 20 F.3d at 1468-69; *Turner v. Tennessee*, 858 F. 2d 1201, 1208 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989). In addition, prosecutors can minimize the opportunity for unethical "gaming" of the system by placing a plea offer on the record in the presence of the defendant.[23]

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[22] The ABA suggests that Petitioners' position should be equally offensive if, instead, it were asserted that prosecutors would routinely lie in responding to post-conviction petitions of this kind by denying that a particular plea offer had been extended, when in fact it had.

[23] Such a procedure would also give the court an opportunity to inquire whether counsel has explained to the client the consequences of taking or not taking the plea offer. *See, e.g., Rivera-Longoria v. Slayton*, 242 P.3d 171, 174 (Ariz. Ct. App. 2010) (holding that under ARIZ. R. CRIM. P. 15.8 the prosecutor must place on the record a plea offer 30 days prior to withdrawing it). The *Rivera-Longoria* court explained that Rule 15.8 was enacted in response to the holding in *Donald*, 10 P.3d at 1205 (finding ineffective assistance based on counsel's failure to convey plea offer), and is "designed to protect a defendant's constitutional

Finally, the concern to "protect[] the finality of convictions," *Padilla*, 130 S. Ct. at 1485, whether obtained through a guilty plea, as in 10-444, or through a jury verdict, as in 10-209, is significant. However, whether constitutionally deficient lawyering has resulted in a plea that is accepted, as in *Hill* and *Padilla*, or is undelivered or rejected, as in these cases, "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* The concern that some frivolous or fraudulent motions may be filed must be balanced against the lack of remedy for violations of a defendant's constitutional right to effective assistance of counsel.

For these reasons, the Court should reject any suggestion that a defendant is entitled to no relief for constitutionally ineffective assistance of counsel that results in loss of an advantageous plea offer. Further, the question of remedy should be left to the discretion of post-conviction courts to fashion relief that is reasonably calculated to place the defendant insofar as

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right to effective assistance of counsel when considering a plea offer. . . [by ensuring that] if a plea offer is extended, the defendant will have all material information to make an informed decision." *Id.*; *see also* ARIZ. R. CRIM. P. 15.8 cmt. (stating that Rule 15.8 is designed "to enable the defendant to make an informed decision on the plea offer with the effective assistance of counsel"); *see also* Standard 19-2.3(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) ("court [should] ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction," a "requirement [that] may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged").

possible in the position he or she would have been in had the constitutional violation not occurred.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the judgment of the court below should be affirmed in each of these cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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No. 10-209 & 10-444

In the Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

STATE OF MISSOURI,
Petitioner,
v.
GALIN E. FRYE,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to provide historical and empirical context to aid this Court's understanding of the importance of the Sixth Amendment right to effective assistance of counsel during the plea process. This brief provides that context and also proposes prophylactic measures that would, if adopted, reduce the risk going forward that counsel's ineffective assistance will deprive a defendant of an opportunity to make informed decisions about his defense during plea negotiations.[1]

SUMMARY OF ARGUMENT

This Court has recognized that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused ... is an essential component of the

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The prevalence of plea bargaining has revolutionized criminal law in this country. Because most defendants forgo their right to trial and resolve criminal charges against them through a plea, the plea process determines the outcomes of the overwhelming majority of criminal cases in the United States.

The obvious disparities in power, information, and resources between defendants and prosecutors make effective assistance of counsel in plea negotiations crucial. The right to effective assistance of counsel is an essential check on the operation of the plea system and is critical to ensuring that defendants' plea decisions are voluntary and intelligent. Accordingly, this Court has recognized that effective assistance of competent counsel is the touchstone for the constitutional legitimacy of the plea process. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

In *Hill v. Lockhart*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985). "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* miscast *Hill* as identifying the *only* circumstance in which the right to counsel at the plea bargain stage may be effectively enforced. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty based on allegedly incorrect information about the consequences of his plea. But the Court conspicuously did *not* attempt to announce in *Hill* a one-size-fits-all rule for every circumstance. Rather, the Court emphasized that *Strickland* prejudice may manifest itself in a variety of ways. *See id.* at 59-60.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea agreement, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. As the federal courts of appeals have uniformly concluded (along with most state appellate courts that have considered the question), such a defendant demonstrates prejudice if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted a lawful plea agreement offered by the prosecution.

The prejudice suffered by such defendants cannot be "cured" by a subsequent fair trial. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from *that deprivation* is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, which establish that the Sixth Amendment right to effective assistance of counsel is not merely in service of a defendant's Fifth Amendment right to a fair trial. Recognizing prejudice in such circumstances is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is usually the only phase of proceedings. Moreover, because States are free to devise, as a matter of state law, appropriate remedies for violations of their citizens' federal constitutional rights, this Court should defer to the remedy fashioned by the courts of the State of Missouri in No. 10-444.

When the State offers a plea, it is making a statement that the interests of justice and enforcement of law are adequately served by that offer. Almost by definition, a higher sentence is overly punitive in the circumstances by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later offer (if any), or disposition without a plea deal, result in a harsher sentence. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not

served by over-punishment. It therefore benefits both defendants and the prosecution to ensure that defendants make a fully informed decision about any plea bargain offered. Simple prophylactic procedures, including ensuring that all plea offers are made on the record in the presence of the defendant, would further that goal. A few States have already adopted such procedures, designed to safeguard defendants' rights to make critical decisions about their defense in light of all the relevant information available.

ARGUMENT

I. A MEANINGFUL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS IS DEMANDED BY THE SIXTH AMENDMENT AND IS A CRITICAL COMPONENT OF THE ADMINISTRATION OF CRIMINAL LAW

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In the United States today, virtually all criminal defendants resolve criminal charges by pleading guilty. Absent the effective assistance of counsel, the disparities in information and power inherent in that process would undermine confidence in the outcome. As this Court has long recognized, defendants are entitled to effective assistance of counsel during the critical plea bargaining phase so that they can make voluntary and intelligent decisions during that process. *Hill*, 474 U.S. at 56; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Contrary to petitioners' argument, the Sixth Amendment right to effective assistance of counsel protects more than a defendant's right to a fair trial; it

also protects a defendant's right to make informed decisions about his or her defense—including whether to plead guilty or proceed to trial. This Court should continue to safeguard that right by holding that a defendant may demonstrate prejudice by showing that, but for counsel's unprofessional errors, he would have accepted a pending offer for a lesser sentence than the one he ultimately received through a subsequent plea or after trial. Only by making the right to counsel at the plea stage meaningful can this Court ensure a tolerable degree of confidence in the plea process and its outcomes.

A. Confidence In The Plea Process And Its Outcomes Is Essential To The Administration Of Criminal Law

Nearly all criminal charges in the U.S. are resolved through plea agreements. According to the United States Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years."[2] Statistics from state courts are virtually identical. In 2006, the most recent year for which data are available, some 95% of convictions obtained in state courts in the seventy-five most populous counties in the U.S. were obtained through guilty pleas.[3] "[P]lea bargaining ... is not some adjunct to the criminal justice system; it *is*

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[2] U.S. Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[3] *See* Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice), rev. July 15, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992). Confidence in the fairness of outcomes achieved through the plea process is therefore absolutely central to the administration of criminal law in this country.

The modern trend favoring guilty pleas was driven in large part by prosecutors' desire to lighten their caseloads. *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, 44, 124 (2003).[4] Because most criminal cases are resolved without trial, a prosecutor's decision about what plea to offer and accept frequently amounts to a final adjudication of guilt and punishment. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 878 (2009).

Lawmakers have taken account of this phenomenon, and "now legislate[] with precisely this framework of prosecutorial power over pleas in mind." *Id.* at 880. Indeed, "the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants." *Id.*[5] As a result, state and federal

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[4] The practice has gained widespread support from judges for similar reasons. Plea bargaining not only creates more space on judges' calendars for growing civil dockets, Fisher, *supra*, at 123-24, it also guards against "the reputational blow of a reversal." *Id.* at 176.

[5] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.5 (2005) (providing examples).

prosecutors can typically choose from a menu of charges—and, therefore, from a menu of potential sentences, often including mandatory minimums. That prosecutorial leverage puts overwhelming pressure on defendants to plead and accept an offer of a lesser sentence. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 538 (2001).

Plea agreements may therefore result in sentences that reflect (more accurately than post-trial sentences) the intended punishment for the crime. Because "[p]leas and cooperation with the government are the preferred norm, not the exception," Barkow, *Institutional Design*, 61 Stan. L. Rev. at 880, "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case"; "'[l]eniency' has therefore become not merely common but a systemic imperative." Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 1006 (8th ed. 2007); *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 Stan. L. Rev. 1399, 1402 (2003) ("Given the extreme severity of sentencing in the United States by world standards ... it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of 'bargains.'"); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 87 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–30 (2005).

Because the punishment imposed through plea bargaining is, in a very real sense, the sentencing

norm, the public must have confidence that the results of that process reflect a fair and reliable outcome reached through a fundamentally fair process.

B. The Legitimacy Of Plea Bargaining Has Historically Depended On Effective Assistance Of Counsel To Counter The Inherently Coercive And Asymmetric Confrontation Between Prosecutor And Defendant

Effective assistance of counsel is central to the institutional legitimacy of plea deals, both because of the inherent risk of coercion during plea negotiations, and because of the stark information and other asymmetries between the parties.

Absent effective counsel, criminal defendants would be wildly disadvantaged vis-à-vis prosecutors at the bargaining table. In 2009, "[m]ore than half of the federal offenders sentenced ... had not completed high school and only 5.4 percent of offenders had completed college." U.S. Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. In light of this Court's recognition that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), these statistics are a stark reminder that educated defendants are a relative rarity in our criminal justice system.

Beyond the obvious information and resource disparities between prosecutors and defendants, and in large part due to the systemic legislative "correction" for plea bargaining, *see supra*, 7-8, there are significant

disparities between sentences imposed through pleas and those imposed after a trial. Defendants who choose to go to trial thus risk suffering a severe "trial penalty." Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA, in The Jury Trial in Criminal Justice* 23, 25 (Douglas D. Koski ed., 2003); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 992 (2005) (average penalty ranged from 13 to 461 percent depending on the state and the offense); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005) (average sentence for federal defendants who go to trial is three times higher than the sentence for defendants who plead to similar charges). The trial penalty phenomenon only amplifies the risk of coercion inherent in all plea bargaining negotiations.[6]

The trial penalty burdens the innocent as well as the guilty. Even innocent defendants may choose to

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[6] The true trial penalty is likely substantially higher than these statistics suggest, given that most studies compare similar charges in assessing the trial penalty and do not account for the common practice of allowing a defendant to plead to a lesser offense than the one initially charged. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 227–28 (2007).

Prosecutors may also seek to impose additional penalties on those who exercise their right to go to trial, including property forfeiture, charges against friends and family, civil or regulatory sanctions, or immigration consequences. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1611 & n.97 (2005).

plead guilty rather than face trial and the attendant risk of a much harsher sentence. Indeed, some scholars have argued that such defendants are even more risk-averse than their guilty counterparts—and therefore more likely to accept a plea. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 Yale L.J. 2011, 2012 (1992).[7] And because sentencing guidelines often prescribe harsher punishments for those claiming innocence (and thus not accepting responsibility), the pressure on innocent defendants to plead guilty is substantial. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1394–98 (2000). The effects of this pressure are evident at least in the federal courts, where acquittal rates have steadily dropped as guilty pleas have risen. Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 102 (showing that acquittal rates fell from a peak of 5.5% of adjudicated case outcomes in 1971 to just 1% in 2002). Although guilty pleas have crowded out all trial outcomes, they have taken the heaviest toll on acquittals. *Id.* at 106.

Driven by the inherent disparities between defendants and prosecutors, as well as the grave risk of

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[7] *See also* Innocence Project, *250 Exonerated, Too Many Wrongfully Convicted* 32-33 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("27% [of 250 inmates exonerated by DNA evidence] were convicted based at least in part on false confessions, admissions or guilty pleas."); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 74 (2008) (analyzing the cases of 200 convicts exonerated by DNA testing, 9 of whom had pleaded guilty to a rape or murder that they did not commit).

coercion at the bargaining table, this Court has long recognized a Sixth Amendment right to effective assistance of counsel during the plea process. The need for counsel's assistance to remedy information and other asymmetries between prosecutors and defendants is a consistent thread throughout this Court's Sixth Amendment decisions. *See, e.g.*, *Williams v. Kaiser*, 323 U.S. 471, 476 (1945) (because "[a] layman is usually no match for the skilled prosecutor," the right to effective counsel during plea negotiations is "'fundamental.'") (quoting *Powell*, 287 U.S. at 70); *id.* at 475-76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."); *Van Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."); *Hill*, 474 U.S. at 56 ("Where ... a defendant is represented by counsel during a plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Petitioners' and the United States' argument that the right to counsel attaches only at the entry of a guilty plea cannot be squared with these and other

precedents of this Court recognizing that the Sixth Amendment right to effective assistance of counsel attaches at the initiation of criminal proceedings against the accused, for any "'critical' stage[]" of those proceedings. *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (citation omitted); *contra Frye* Petr. Br. 19; *Lafler* Petr. Br. 12 n.3; *Frye* U.S. Br. 23 n.6; *Lafler* U.S. Br. 18.

Moulton, for example, involved law enforcement's surreptitious recording of conversations between the defendant and a codefendant cooperator, after the defendant had been charged. 474 U.S. at 176-77. Holding that the defendant's Sixth Amendment right to counsel had been violated, the Court explained that the right attaches at the initiation of criminal proceedings, because "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). In light of the arguments pressed here by petitioners and the United States, it is worth quoting the Court's opinion in *Moulton* at some length:

> The assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, 'critical' stages in the criminal justice

> process "where the results might well settle the accused's fate ...."

Id. (citation omitted).

Plea negotiations invariably take place after the initiation of criminal proceedings, and no phase of criminal proceedings requires a more direct confrontation between the defendant and prosecutor or is more likely to "settle the accused's fate." Thus, as this Court very recently reaffirmed, "the *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added).

C. A Defendant Who Is Deprived Of The Opportunity To Make An Informed Decision Regarding The Prosecution's Plea Offer Is Prejudiced If He Receives A Harsher Sentence Than He Would Have, But For Counsel's Unprofessional Errors

Under *Hill*, a defendant who accepts a plea based on counsel's deficient advice demonstrates *Strickland* prejudice if there is "a reasonable probability" that the "outcome of the plea process" would have been different but for counsel's errors. 474 U.S. at 59. In the instant cases, respondents Cooper and Frye were denied the opportunities to make informed decisions about whether to accept pending plea offers. As the federal courts of appeals uniformly have concluded, defendants like Cooper and Frye demonstrate prejudice under *Strickland* where there is a reasonable probability that the outcome of the plea process would have been different—*i.e.*, that they would have *accepted* the State's pending plea offer—but for counsel's unprofessional errors.

In *Strickland*, this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. The defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88; and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Applying that test in *Hill*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. *"[I]n the context of guilty pleas,"* this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* misread *Hill* as identifying the *only* circumstance in which there can be prejudice from the ineffective assistance of counsel at the plea bargain stage. *Hill* is not so circumscribed. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty instead of proceeding with trial, and allegedly made that decision based on incorrect information about the consequences of his plea. But the Court did *not* suggest, much less hold,

that a defendant could not demonstrate *Strickland* prejudice, as a matter of law, unless he or she had entered a guilty plea relying on the deficient advice of counsel.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea offer, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. *See also Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones* and holding that such a defendant has been deprived of "the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law"); *In re Alvernaz*, 830 P.2d 747, 755 (Cal. 1992) (citing *Jones* for the proposition that "a defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense").

A defendant's right to make fully informed decisions about his or her case is distinct from the right to a fair trial, but is no less important, particularly in view of the high proportion of criminal cases resolved through plea bargaining. As this Court recently reminded in the choice-of-counsel context, "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzales-Lopez*, 548 U.S. 140, 145 (2006); *see also Williams v. Jones*, 571 F.3d 1086, 1092 (10th Cir. 2009) ("*Gonzalez-Lopez* recognizes that counsel can be ineffective where 'his mistakes have harmed the defense.' Surely, the plea process is part of the

defense.") (quoting *Gonzalez-Lopez*, 548 U.S. at 147), *cert. denied*, 130 S. Ct. 3385 (2010).

As the federal courts of appeals have uniformly concluded, such a defendant demonstrates prejudice under *Strickland* and *Hill* if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted the plea.

The prejudice suffered by such defendants cannot be "cured" by subsequent constitutionally adequate procedures. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from that deprivation is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, and it is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is often the most critical and indeed the only phase of proceedings.

Petitioners and their *amici* create a straw man by framing the issue as whether the defendants have a constitutional right to a plea bargain, or a right to receive the lowest possible sentence. Defendants, of course, do not have a freestanding right to receive a particular plea offer or any plea offer at all. But defendants also do not have a constitutional right to an appeal, *Jones*, 463 U.S. at 751, yet defendants are

entitled to effective assistance of counsel when there is an opportunity to appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

"Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process," *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring), thereby depriving him or her of the right "to make certain fundamental decisions regarding [his] case," including "whether to plead guilty," *Jones*, 463 U.S. at 751; *see also Frye* U.S. Br. at 17 ("[A] defendant must establish that counsel's deficient performance deprived him of a 'substantive or procedural right to which the law entitles him.'") (citation omitted). For these reasons, petitioners' and the Solicitor General's reliance on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), is entirely misplaced. *See, e.g., Frye* U.S. Br. 15-17.

In *Whiteside*, the defendant petitioned for habeas corpus relief from his state murder conviction on the ground that his counsel was ineffective for refusing to cooperate in presenting perjured testimony. 475 U.S. at 162-63. Because the attorney conformed to "accepted norms of professional conduct" in refusing to assist perjury against his client's wishes, this Court "discern[ed] no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel." *Id.* at 171. In other words, the defendant's claim failed step one of *Strickland*, so the later discussion of whether Whiteside was "prejudiced" by his failure to perjure himself is superfluous dicta. *See id.* (counsel's "representation of Whiteside f[ell] well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable

under *Strickland*"). In the instant cases, by contrast, there is no genuine dispute that counsel's errors fell outside "accepted standards of professional conduct." (As the Solicitor General points out, the questions presented are premised on the fact that they did. *Frye* U.S. Br. 13 n.2.)

Moreover, nothing in this Court's discussion of prejudice in *Whiteside* suggests, much less "confirm[s]," *Frye* U.S. Br. 15, that there is no "cognizable prejudice" when counsel's unprofessional errors undermine the fairness of the plea process. Indeed, it is startling that the United States would compare Whiteside's desire to present perjured testimony with these defendants' insistence on the right to make informed decisions fundamental to their liberty.

Fretwell is equally inapposite. There, the defendant argued that he had been prejudiced by his counsel's failure to make an objection at the capital sentencing phase of his trial based on a then-valid Eighth Circuit decision, *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), holding that a death sentence is unconstitutional if based on an aggravating factor that duplicates an element of the underlying felony. *Fretwell*, 506 U.S. at 384. Although the Eighth Circuit had since overruled *Collins*, thereby recognizing that *Collins* was legally erroneous, that court held on habeas review that Fretwell had shown prejudice under *Strickland*, because the trial court would have sustained the *Collins* objection, had it been made at Fretwell's trial. This Court reversed, explaining that a defendant seeking to demonstrate *Strickland* prejudice must show that counsel's errors rendered the proceedings "unfair or unreliable." *Id.* at 369. The Court explained

that Fretwell's sentencing was neither unfair nor unreliable, because "ineffectiveness of counsel [did] not deprive [Fretwell] of any substantive or procedural right to which the law entitles him." *Id.* at 372.

As in *Whiteside*, Fretwell was not entitled "'to the luck of a lawless decisionmaker.'" *Id.* at 370 (quoting *Whiteside*, 475 U.S. at 175, in turn quoting *Strickland*). That is, a defendant cannot "demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373 (O'Connor, J., concurring); *id.* at 373-74 (listing the "likely effect of perjured testimony," "the impact of a meritless Fourth Amendment objection," and "the effect of an objection [that is] wholly meritless under current governing law" as the only factors the Court has held to be impermissible considerations in the prejudice inquiry).

A defendant who receives ineffective assistance of counsel during plea negotiations because counsel withheld information, or provided materially false information relevant to the fundamental decision to plead or go to trial, has been deprived of his right to exercise authority over fundamental decisions in his defense. That is a substantive right to which the law entitles him, *see Barnes*, 463 U.S. at 751, the deprivation of which renders the outcome fundamentally "unfair" under *Fretwell*. *See Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("[I]ncompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question."); *cf. Gonzales-Lopez*, 548 U.S. at 145 (defendant's Sixth Amendment rights cannot be simply "disregarded so long as the trial is, on the whole, fair").

Adopting variants of this reasoning, *every* federal court of appeals—and all but two state appellate courts to have addressed the question—recognize that a defendant who rejects a favorable plea offer and proceeds to trial is entitled to relief under the Sixth Amendment if he can prove that there is a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional errors. *See United States v. Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on sixth amendment grounds if counsel's performance during plea bargaining" was ineffective.); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (defendant suffered prejudice, even though the government had not made a formal plea offer, because "he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial," due to counsel's errors); *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) (defendant stated claim for ineffective assistance of counsel where he alleged that he would have accepted a plea bargain but for trial counsel's failure to explain that defendant might be classified as a "career offender"); *Arnold v. Thaler*, 630 F.3d 367, 372 (5th Cir. 2011) ("[T]o establish that he was prejudiced by his counsel's deficient performance, [defendant] need only demonstrate a reasonable probability that he would have accepted the ... plea offer before it was withdrawn, had his counsel told him about the offer."); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) ("The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice."); *Julian v.*

Bartley, 495 F.3d 487, 498 (7th Cir. 2007) ("In the context of plea agreements, the prejudice prong focuses on whether the deficient information was the decisive factor in a defendant's decision to plead guilty or to proceed to trial."); *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000) (holding that "prejudice is possible, notwithstanding a subsequent fair trial, where counsel failed to provide accurate advice regarding a plea agreement offer"); *Nunes*, 350 F.3d at 1053 (prejudice resulted where defendant was deprived of "the right to counsel's assistance in making an informed decision once a plea had been put on the table"); *Williams v. Jones*, 571 F.3d at 1090 n.3 ("[A] defendant is required to show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty."); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995) ("In other words, in this instance, Coulter 'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'") (quoting *Hill*, 474 U.S. at 59); *In re Alvernaz*, 830 P.2d at 754; *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993-94 (Mass. 2004); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *Cottle v. State*, 733 So.2d 963, 966-67 (Fla. 1999); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986); *Tucker v. Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *State v. Simmons*, 309 S.E.2d 493, 497-98 (N.C. Ct. App. 1983); *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000); *Ex parte Lemke*, 13 S.W.3d 791,

796-97 (Tex. Crim. App. 2000), *In re McCready*, 996 P.2d 658, 659-60 (Wash. Ct. App. 2000); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

Any other rule would render the Sixth Amendment right to counsel at the plea bargaining stage an empty promise, as a right without the possibility of relief from its deprivation is no right at all.

II. PROSECUTORS SHOULD BE ENCOURAGED TO OFFER ANY PLEA BARGAIN ON THE RECORD IN THE PRESENCE OF THE DEFENDANT

As this Court has long recognized, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *American Trucking Assn's, Inc. v. Smith*, 496 U.S. 167, 178-79 (1990)); *see also Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Danforth*, 552 U.S. at 289 ("While we have ample authority to control the administration of justice in the federal courts[,] ... we have no comparable supervisory authority over the work of state judges."). Accordingly, if this Court agrees that respondents have a Sixth Amendment right to effective assistance during plea negotiations, it should defer to the Missouri courts as to the proper remedy in No. 10-444, *Missouri v. Frye*.

Petitioners' asserted fears that recognizing prejudice (and a remedy for it) in these circumstances will open the "floodgates" are unfounded. It bears emphasis that *every* federal court of appeals—and all

but two States to have considered the question—currently recognize prejudice under *Hill* and enforce Sixth Amendment rights in these circumstances, so a decision in respondents' favor would essentially maintain the status quo.

And, as this Court observed in *Padilla*, "[s]urmounting *Strickland*'s high bar is never an easy task." 130 S. Ct. at 1485. Similar "floodgates" claims were raised and rejected in *Hill*, and "[a] flood did not follow in that decision's wake." *Id.* at 1484-85; *see also* Gray Proctor & Nancy King, *Post*-Padilla: Padilla's *Puzzles for Review in State and Federal Courts*, 23 Federal Sentencing Reporter 239, 244 (2011) ("Although Padilla will probably result in an increase in prisoner filings, successful collateral challenges will be more of a trickle than the roaring stream of upset convictions evoked by the 'floodgates' imagery.").[8]

In the federal courts, pleas of guilty and *nolo contendere* rose sharply between 1991 and 2001, Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 91, concurrent with many of the federal court decisions recognizing that claims of ineffective assistance at the plea stage demand a remedy, *see, e.g.*, *Rodriguez*, 929 F.2d at 753 n.1; *Gordon*, 156 F.3d at 380; *Day*, 969 F.2d at 42; *Coulter*, 60 F.3d at 1504. There is no evidence that the widespread, nearly uniform development in Sixth Amendment jurisprudence has dampened

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[8] Similarly, in *Henderson v. Morgan*, this Court called Petitioner's fears that a decision in favor of the defendant would invite countless collateral attacks on judgments "exaggerated." 426 U.S. 637, 646-47 (1976). "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 647.

prosecutors' enthusiasm for plea bargaining to even the slightest degree.

Petitioner Frye also argues that a ruling in respondents' favor would encourage defense attorneys intentionally to withhold offers, on the theory that such a strategy would be a win-win for their clients. *Frye* Petr. Br. 28. But the states are quite capable of crafting rules to prevent that sort of gamesmanship.

Arizona is a case in point. Like all the federal appellate courts and the majority of states that have addressed the issue, the Arizona Court of Appeals has held that "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make a uninformed decision to reject a plea bargain and proceed to trial." *Donald*, 10 P.3d at 1200. In response to that decision, the Arizona trial courts now routinely conduct a so-called *Donald* hearing when a defendant rejects a plea offer and decides to proceed to trial. *Donald* hearings are meant "to ensure, *prior to trial*, that [the defendant] adequately understood the state's plea offer and the consequences of conviction." *State v. Ware*, No. 2 CA-CR 2011-0010-PR, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011); *id.* (denying defendant's ineffective assistance claim because he rejected plea offers following *Donald* hearings and therefore could not show prejudice); *see also Rivera-Longoria v. Slayton*, 242 P.3d 171, 172 (Ariz. Ct. App. 2010) (noting that the defendant had rejected a plea offer at a *Donald* hearing before asking for the offer to be reinstated).

States could of course devise other, even simpler, procedures towards the same goal. In New Jersey, for example, "[p]rior to the arraignment/status conference

the prosecutor and the defense attorney shall discuss the case, including any plea offer ... and report thereon at the arraignment/status conference." N.J. Ct. R. 3:9-1(b). The rules further provide that "[e]ach status conference shall be held in open court with the defendant present." N.J. Ct. R. 3:9-1(c). In addition, "[a]ny plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney." N.J. Ct. R. 3:9-1(b). New Jersey's rules "reflect the importance of informed plea bargaining, requiring that a defendant be advised at the pretrial conference of the sentencing exposure for the offenses charged." *State v. Dennis*, 2011 WL 31360, at *3 (N.J. Super. App. Div. Jan. 6, 2011) (citing Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, cmt. 1.4.2. on R. 3:9-2 (2011)).

Other states may soon follow suit. For example, in *In re Alvernaz*, *see supra*, 16, the Supreme Court of California encouraged the memorialization of plea offers in order to discourage future claims that "with effective representation, [the defendant] would have accepted the proffered plea bargain." 830 P.2d at 756. Specifically, the court encouraged "parties to memorialize in some fashion prior to trial" (1) the fact that a plea bargain offer was made, (2) that the defendant was advised of the offer, its precise terms, and the range of punishments that could result from either accepting the plea bargain or proceeding to trial, and (3) the defendant's response to the offer. *Id.* at 756 n.7. That court observed that if parties take these steps, "subsequent claims of ineffective assistance of counsel in[volving] the defendant's decision to reject the offer are likely to fail unless the record establishes

that the information provided the defendant, as memorialized, was incomplete or inaccurate." *Id.*[9]

Requiring that defendants make crucial decisions about their own defense on the record, or that they be advised of critical information on the record, is not a new or radical innovation but a logical extension of current practice. For example, since 1969 this Court has required that the record must reflect that a guilty plea was entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). The Federal Rules of Criminal Procedure and many state jurisdictions also require judges to develop the basis of a guilty plea on the record. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *see, e.g.*, *Watt v. State*, 420 S.E.2d 769, 770 (Ga. Ct. App. 1992) ("[T]he record as a whole must show that the defendant understood the rights he was waiving and that the plea was entered voluntarily ... ."); *People v. Lopez*, 525 N.E.2d 5, 7 (N.Y. 1988) (requiring defendant to

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[9] A Florida state judge has similarly advocated for all plea offers to appear on the record. Hon. Anthony K. Black (Judge, 13th Judicial Circuit) & Susan S. Matthey (senior staff attorney of the 13th Judicial Circuit), *Advice to the Criminal Bar: Preparing Effectively for Allegations of Ineffectiveness*, 82 Fla. B.J. 49, 50 (May 2008) ("[I]f the record reflects when plea offers are conveyed and rejected, such will allow for a summary denial of allegations of ineffective assistance of counsel for failure to convey a plea offer.").

describe the circumstances of the commission of the crime and holding that where "factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered"); *see also Santobello*, 404 U.S. at 261 ("[Federal Rule of Criminal Procedure] 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on *the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.").

A ruling in respondents' favor should incentivize prosecutors to take proactive steps toward ensuring that defendants are fully informed of any plea offer by, at a minimum, advising defendants of the terms of any plea offer on the record in open court. Providing incentives for compliance with such procedures (and for proactive steps by the prosecution to ensure communication of an offer even in the absence of state-mandated procedures) ultimately inures to the benefit of both defendants and prosecutors, as the prosecution should have a keen interest in resolving criminal charges, if possible, on terms that the State believes fairly serve the interests of justice.

When the State offers a plea, the offer reflects the State's judgment that the interests of justice and law enforcement are adequately served by that offer. Almost by definition, then, a higher sentence is overly punitive in the circumstances, by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later

offer (if any), or disposition without a plea deal, result in a harsher sentence. There must be some incentive to avoid imposing costs on the State to prepare for and try the case. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not served by over-punishment.

CONCLUSION

This Court should hold that a defendant who demonstrates a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors, suffers prejudice for Sixth Amendment purposes. This Court should defer to the courts of the State of Missouri as to the appropriate remedy for defendant Frye's constitutional injury.

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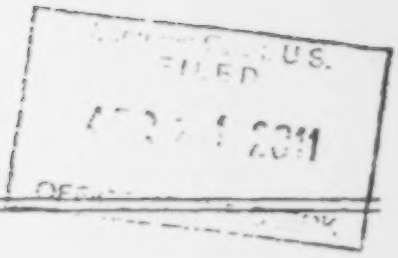
No. 10-209



In The

Supreme Court Of The United States

BLAINE LAFLER,
Petitioner,

v.

ANTHONY COOPER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE CONNECTICUT AND 26 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

II. What, remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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STATEMENT OF INTEREST

The *amici* states have a compelling interest in defending presumptively valid judgments of their courts against post-conviction claims of ineffective assistance. They therefore have a strong interest in ensuring that the law governing such claims is properly applied. Thus, the *amici* states have a substantial interest in this Court's determination of whether states must provide relief to, and a remedy for, a criminal defendant who has received a fair trial after he has forfeited the potential for "more favorable" pretrial disposition due to attorney error.[1]

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals ruled that Michigan courts unreasonably applied or contravened this Court's precedents in concluding that the respondent, convicted after a constitutionally sound trial, was not deprived of the effective assistance of counsel when he rejected a "more favorable" plea offer due to attorney error. In fact, no ruling from this Court clearly establishes that a constitutional violation results in this "foregone plea" context. The Court has, however, touched upon the foregone plea situation in the context of a treaty violation claim.

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[1] Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; Conn. Gen. Stat. § 51-278(c).

In Breard v. Greene, 523 U.S. 371 (1998) (per curiam), a foreign national rejected a plea offer that would have spared his life, and he was sentenced to death following trial. He claimed that the Vienna Convention on Consular Relations was violated because he was not given the right, upon arrest, to contact his nation's Consulate, upon whose advice he would have accepted the offer. This Court held that the claim was procedurally defaulted, but nonetheless opined:

> Even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.

Id. at 377 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)) (harmless error analysis). Admittedly, this dictum does not "clearly establish" any rule arising in the foregone plea context. Williams v. Taylor, 529 U.S. 362, 412 (2000). However, it *is* consistent with the rule, clearly established in Strickland v. Washington, 466 U.S. 668 (1984), that the Constitution is not violated merely because a defendant does not receive the "most favorable" disposition.

At the time this Court heard and decided Strickland, a debate existed regarding the role of a criminal defendant's attorney. That debate is reflected in the following note, published that same year:

> The role of a [defense attorney] is not [to] see that his or her client received a fair trial and that a just outcome resulted. The attorney's role is to do everything ethically proper to see that the client receives the most favorable outcome possible – whether or not it produces an outcome which society considers just. . . . The guiding principle in determining whether an attorney has provided effective representation must then be whether he or she discharged the role of partisan advocate faithfully and zealously, not whether the performance yielded what a court views as a just result.

William Genego, "The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation," 22 Am.Crim.L.Rev. 181, 200 (1984).

The Court rejected the view that the *Constitution* requires counsel to procure the "most favorable outcome possible – whether or not it produces an outcome which society considers just." The Court *unambiguously* held that the effective assistance of counsel is embodied in the opposite view, stating:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system *to produce just results.*

Strickland, 466 U.S. at 685 (emphasis added). Thus, the Strickland rule is that attorney error is not *constitutional* error unless it causes an unreliable or unfair judgment. Here, the Sixth Circuit's ruling overturns the "just result" of a constitutionally sound trial in order to give to a defendant the "most favorable outcome." Accordingly, the Sixth Circuit's decision, rather than that of the Michigan courts, contravenes clearly established law embodied in this Court's rulings.

The Sixth Circuit is far from alone. This case and the closely related case of Missouri v. Frye, No. 10-444, 79 U.S.L.W. 7 (August 24, 2010), are the culmination of a phenomenon that emerged shortly after the Strickland decision. Specifically, beginning with the Sixth Circuit's 1988 decision in Turner v. Tennessee, 858 F.2d 1201 (1988), vacated, 492 U.S. 902 (1989), courts have almost universally failed to apply Strickland in the foregone plea context. Some courts reason that a failure in the communication of a plea offer between attorney and client is an "inherent prejudice" constituting ineffective assistance of counsel without regard to whether, as required by Strickland, there is *actual* prejudice to the defense. E.g., United States v. Rodriguez, 929 F.2d 747, 753 (1st Cir. 1991), Cottle v. State, 733 So.2d 963, 969 (Fla. 1999), State v. James, 48 Wash. App. 353, 364 (1987). In doing so, these courts treat the error not as trial error, which Strickland is designed to identify, but as "structural" error, undermining the reliability of the conviction without regard to the "effect on the trial" that this Court considered in its Breard dictum. Other courts, like the Sixth Circuit below, invoke Strickland's *trial error* test; however, they unwittingly abandon Strickland's prejudice requirement and render the

attorney's error *per se* prejudicial. Consequently, they use the Constitution to enforce attorney ethics rather than to deliver a "just result."

In this case, for example, the Sixth Circuit, while ostensibly applying Strickland, determined there to be a constitutional deprivation because of deficient performance alone. Whereas Strickland requires that ineffective assistance flow from prejudice, in the Sixth Circuit's view, prejudice flowed from ineffective assistance ("If counsel provided ineffective assistance, we must *then* determine whether the petitioner was prejudiced", "[we have] consistently rejected such a myopic view of *prejudice from a deprivation of the right to counsel*", "[defendant] was deprived of his constitutional right to effective assistance of counsel. *Thus he has established prejudice*"). Accordingly, the test employed by the Sixth Circuit was the inverse of Strickland; its effect was to treat the error as structural in nature.

These and similar approaches, while purporting to correct constitutional violations, simply enforce professional mores. There is perhaps no better example of this trend than that found in the Ninth Circuit. In Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003), the Ninth Circuit Court of Appeals held that a defendant led by his attorney's mistake to stray from "more favorable" pretrial disposition is deprived of constitutional guarantees. According to Nunes, a defendant in the plea-rejection-due-to-attorney-error context loses key rights to make an informed decision and decide his own fate. Id. at 1052-53. However, where a *judge's* error prompted a *pro se* defendant to

reject a plea offer, the Ninth Circuit acknowledged that there is no constitutional entitlement to a plea, and that, "[w]hen a defendant turns down a guilty plea, he is giving up only the opportunity to limit his exposure to the terms of that plea." United States v. Forrester, 616 F.3d 929, 939 (9th Cir. 2010). Such dual reasoning evinces a focus -- not on *constitutional* error -- on *attorney* error.

In granting to a defendant what he may view as an optimum outcome, rather than the "just result" that the Constitution guarantees, courts have employed overly broad definitions of "defense" and "adversarial process," reasoning that these things are impeded when counsel error causes the forfeiture of the potential for pretrial disposition. The short answer to the controversy now before the Court is that the State is not obligated to resolve criminal matters through plea disposition. Likewise, the defendant is not entitled to have his criminal matter disposed of by plea arrangement more favorable that the "just result" produced by trial. The inquiry ends there.

The Constitution guards the adversarial process, and flaws in that process are therefore attributable to the State. The "adversarial process," in Sixth Amendment jurisprudence, is the system by which the State's evidence against a criminal defendant is tested to ensure a reliable answer to the question of whether the defendant is guilty of the crime charged. Structural errors, which pervade the framework within which a criminal trial is conducted, warrant a *presumption* of a breakdown in the adversarial process. Trial errors, however, are harmless unless reasonably likely to have

rendered the factual determination of a defendant's guilt unreliable – i.e., that the *defense* (not the *defendant*) has been prejudiced. Finally, some errors that have no bearing on the determination of guilt nonetheless warrant remedial measures because they cast doubt upon the integrity of the adversarial process.

The failure of a defendant's attorney to properly convey to him the State's discretionary plea offer – or to convey it at all – neither affects the framework within which a criminal trial is conducted nor casts doubt upon a determination of guilt after trial unencumbered by constitutional error. Moreover, because the State is not involved in the error, a remedial or "prophylactic" measure to restore confidence in the judicial system is unnecessary. In short, attorney error that causes the loss of a plea offer is just that – attorney error. It is not *constitutional* error.

For this reason, the *amici* respectfully urge that relief from the just results of a constitutionally sound trial or a constitutionally valid guilty plea is not available to a defendant who has suffered – and no remedy can cure – the loss of "the most favorable outcome possible" when attorney error causes the forfeiture of a prosecutor's discretionary plea offer.

ARGUMENT

I. INTRODUCTION

Constitutional rights emanate from the State's obligation to provide a criminal defendant all to which he is entitled. Connecticut Board of Pardons v.

Dumschat, 452 U.S. 458, 465 (1981); Schmerber v. California, 384 U.S. 757, 766 (1966); Cf., Greenholtz v. Inmates, 442 U.S. 1, 7 (1979) (internal cite and quote omitted) ("to obtain a protectible right, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it"). The Sixth Amendment entitles a criminal defendant to the assistance of counsel "for his defence." U.S. CONST. Amend. VI. This "defense" for which a defendant is entitled to assistance, however, does not itself create entitlements to all things an attorney may obtain for a defendant. The word "defence," as it is used in the Sixth Amendment, means "defense at trial, not defense in relation to other objectives that may be important to the accused." Rothgery v. Gillespie County, 554 U.S. 191, 216 (*Alito, J.*, concurring); see Faretta v. California, 422 U.S. 806, 818 (1975) (emphasis added) ("the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to ***make a defense as we know it.***"). Thus, the right to counsel secures for a defendant all *other* rights to which he is entitled. Maine v. Moulton, 474 U.S. 159, 169 (1985); see Schmerber, 354 U.S. at 766 (emphasis added) (rejecting Counsel Clause claim because "[n]o issue of counsel's ability to assist petitioner in respect of any right he *did* possess is presented.").

At the same time, the State is not obligated to grant a defendant all benefits or advantages he would like to have. For this reason, the Court has recognized that "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. The State *is*, however, responsible to cure

defects caused by attorney errors to the extent they impede its obligation to provide a fair and reliable adjudication. Kimmelman v. Morrison, 477 U.S. 365, 382-83 (1986).

> The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. "Unless a defendant charged with a serious offense has counsel able *to invoke the procedural and substantive safeguards* that distinguish our system of justice, a serious risk of injustice infects the trial itself. *When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.*"

Evitts v. Lucey, 469 U.S. 387, 396 (1985) (emphasis added) (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

The adversarial process balances the defendant's substantive and procedural entitlements and the State's obligations. The "adversarial process," as this Court has defined it, is one in which factfinding and truth-seeking take place in a rule-based environment to reach a reliable judgment. United States v. Nobles, 422 U.S. 225, 230-31 (1975); Herring v. New York, 422 U.S. 853, 862 (1975); Polk County v. Dodson, 454 U.S. 312, 318 (1981). For that reason, "the right to the effective assistance of counsel is recognized not for its own sake,

but because of the effect is has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984).

> [T]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

Strickland, 466 U.S. at 685 (internal quote omitted); see also, Herring, supra, at 857:

> ([T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the *adversary factfinding process* that has been constitutionalized in the Sixth and Fourteenth Amendments.)

Thus, the Court's Sixth Amendment jurisprudence recognizes that counsel's assistance is necessary – not to procure benefits and advantages – when a defendant is *confronted* by his adversary (the prosecution) on the road toward a fair and reliable adjudication *on the merits* of his criminal case. United States v. Ash, 413 U.S. 300, 307-15 (1973).

Most ineffective assistance cases involve counsel's performance during the course of a legal proceeding.

Roe v. Flores-Ortega, 528 U.S. 470, 481-82 (2000). In those cases, whether a defendant must show actual prejudice resulting from the error, or whether a breakdown in the adversarial process will be presumed, depends upon the magnitude of the deprivation. Id. If the error constitutes "structural error," a breakdown in the adversarial system is presumed. Cronic, 466 U.S. at 659-60. That is, the State is burdened with a presumption that it has not met its constitutional mandate of providing a fair adjudication, for two reasons. First, prejudice is so likely in these circumstances that case-by-case inquiry is not worth the cost. Second, the impairments are easy to identify and, because the prosecution is directly responsible for them, easy for the State to prevent. Strickland, 466 U.S. at 692.

Aside from these situations, a defendant must show, in accordance with Strickland, that the claimed error *actually* undermined the trial's fairness and reliability – *i.e.*, that it is reasonably likely that harmful trial error resulted. The Court has applied Strickland's prejudice requirement where claims of counsel error led not to a judicial proceeding of disputed reliability, but to the forfeiture of a proceeding to which the defendant was entitled. Flores-Ortega, 528 U.S. at 483. In Flores-Ortega, for example, the claim was that counsel erred in failing to file appeal papers, and the defendant was denied an opportunity to appeal. Similarly, in Hill v. Lockhart, 474 U.S. 52 (1985), it was claimed that counsel was ineffective when his advice caused the defendant to enter a plea and forfeit his trial. In these cases, a defendant had to prove a breakdown in the adversarial process by showing that,

but for counsel's error, he would not have forfeited the proceeding to which he was *entitled*. See Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) (emphasis added) ("counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding *to which he was otherwise entitled*.")

Here, though, it is claimed that counsel error during the pretrial period caused the forfeiture – not of a proceeding to which the defendant was entitled – of plea disposition that the State is not obligated to provide and the defendant is not entitled to receive. The definition of "adversarial process" should not bow to accommodate a defendant's desire to receive the most favorable outcome, to which he is *not* entitled. It should remain, as it always has, a process that provides to a criminal defendant his right to *confront the State's evidence* against him in a factfinding process to "ensure that justice is done" – *i.e.*, a "just result." United States v. Nixon, 418 U.S. 683, 709 (1974). Plea disposition is not concerned with factfinding; it is not concerned with the adversarial process at all until the *entry* of a plea eclipses that process. Mabry v. Johnson, 467 U.S. 507-08 (1984), unrelated dictum disavowed, Puckett v. United States, 120 S.Ct. 1423, 1430 n. 1 (2009); Menna v. New York, 423 U.S. 61, 63 n. 2 (1975). The mere extension of a plea offer is neither confrontational nor adversarial. Accordingly, by definition, there is no breakdown in the adversarial process in the foregone plea context.

The Sixth Circuit below and many other courts have not ended the analysis there. They have drawn from various precedents to piece together a resolution

that provides to the defendant the terms of the foregone plea, often blending the lines between Cronic (prejudice presumed) and Strickland (no presumption). In fact, an attorney's error that causes the loss of the *potential* for pretrial disposition is not "structural" error. Hence, a defendant must show a breakdown in the adversarial process by showing that the error was reasonably likely to render the judgment unreliable or unfair. Because he cannot, the error is not *constitutional* error at all.

II. ATTORNEY ERROR THAT CAUSES FORFEITURE OF PLEA DISPOSITION IS NOT "STRUCTURAL" ERROR

Attorney error that causes forfeiture of potential pretrial disposition does not fit the definition of "structural error." This "limited class of cases" involves errors that are "so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome." Neder v. United States, 527 U.S. 1, 7-8 (1999) (citations omitted). They "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . and necessarily render a trial fundamentally unfair." Id.

This Court has recognized three Sixth Amendment contexts giving rise to structural error:

1.) Where counsel is totally absent, or prevented from assisting the defendant at a "critical stage" of the prosecution (which this Court has referred to as a "complete denial of counsel");

2.) Where counsel fails entirely to subject the prosecution's case to meaningful adversarial testing; and,

3.) Where the surrounding circumstances are such that no competent attorney could assist a defendant.[2]

Wright v. Van Patten, 552 U.S. 120, 124-25 (2008); Bell v. Cone, 535 U.S. 685, 695-96 (2002). The error at issue here is none of these things.

The fact that the attorney's error has caused the loss of potential pretrial disposition does not indicate that the surrounding circumstances were such that *no* attorney could assist the defendant. See Powell v. Alabama, 287 U.S. 45, 58 (1932) (defendant not assisted "in any substantial sense" because no definitive appointment of counsel). Nor does such error mean that counsel failed *entirely* to subject the prosecution to meaningful adversarial testing. In such a case, the attorney's failure to test the prosecutor's case must be "complete"; he must have failed to oppose the prosecution *throughout the proceeding as a whole*. Bell, supra, 535 U.S. at 697.

The third category of *per se* prejudice cases is where courts typically blend the concepts of structural error and Strickland-type trial error. The Sixth Circuit below, like many courts in this context, reasoned that the respondent was denied his right to counsel at the

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[2] Conflicts of interest justify a limited presumption of prejudice. Strickland, 466 U.S. at 692.

critical stage of plea bargaining and, consequently, he was prejudiced. However, denial at a "critical stage" is the hallmark of *structural* error. See Cronic, 466 U.S. at 659 (discussing "critical stage" concept as a basis for a "*presumption* that counsel's assistance is essential"); Bell, 535 U.S. at 695-96 (same); Wright, 552 U.S. at 125. It, too, allows for *presumed* prejudice where there is a *complete* denial of counsel's presence at a "critical stage" of the prosecution. If the court could conclude that counsel was denied at a "critical stage," then prejudice is presumed and there is no need to apply Strickland. The Strickland test is employed for the very reason that there is *not* a denial of counsel's assistance at a critical stage.

The *amici* acknowledge that this Court recently stated:

> [W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.

Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010) (citing Hill, 474 U.S. at 57). Padilla and Hill involved counsel's advice to *accept* a plea offer. To be sure, "[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres." Iowa v. Tovar, 541 U.S. 77, 81 (2004) (emphasis added, citations omitted). However, plea negotiations alone do not implicate the Constitution:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

Mabry v. Johnson, 467 U.S. at 507-08. Hence, if Padilla means that plea negotiations implicate the Constitution even where they do not result in plea disposition, it cannot coexist with Mabry. Attorney error that causes forfeiture of pretrial disposition does not amount to the denial of counsel at a critical stage.

Whether an event constitutes a "critical stage" of the proceeding depends upon the right sought to be vindicated. The interest at stake in a claim of ineffective assistance is the trial right. Because forfeiture of pretrial disposition, even due to attorney error, does not risk the trial right, it does not amount to a "critical stage" of the proceedings. Indeed, this Court has noted:

> It is true enough that the purpose of the rights [set forth in the Sixth Amendment] is to ensure a fair trial . . . [but] it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.

United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006). However, this statement pertains to situations

where the interest at stake is not the trial right. For example, in Gonzalez-Lopez,

> The right at stake [was] the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice [was] required to make the violation "complete."

Id. at 146. This was so because "[t]he right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial." Id. at 147. Similarly, in Kansas v. Ventris, 129 S.Ct. 1841 (2009), the right at stake was "the right to be free of uncounseled interrogation," thus, "[t]he constitutional violation occur[ed] when the uncounseled interrogation [was] conducted," regardless of its effect on an ensuing trial. Id. at 1846 ("The assistance of counsel has been denied at the prior critical stage which produced the inculpatory evidence.").

However, the right to the *effective* assistance of counsel was derived from the due process purpose of ensuring a fair trial. Gonzalez-Lopez, 548 U.S. at 147 (citing McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)). The limits of the right to effective assistance of counsel, therefore, are logically derived from the same purpose. Gonzalez-Lopez, supra, at 147.

> The requirement that a defendant show prejudice in ineffective representation cases arises from the very nature of the specific element of the right to counsel at

> issue there – *effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus a violation of the Sixth Amendment right to effective representation is not "complete" until the defendant is prejudiced.

Id. (citation omitted, emphasis in original). Thus, *in ineffective assistance cases*, there is no denial of counsel's assistance at a critical stage unless counsel's absence at that stage risks a substantial probability of derogation from the right to a fair trial.

It is true that, in Powell, this Court stated that "the period from arraignment to trial [is] perhaps the most *critical period* of the proceedings . . . during which the accused requires the guiding hand of counsel." Powell, 287 U.S. at 57 (emphasis added). However, this Court has never held the determination of whether counsel is absent at a "critical stage" to be as simple as answering whether the pretrial event in question occurred during Powell's "critical period." See Rothgery, 554 U.S. at 213-14 (*Alito, J.*, concurring) (distinguishing between "attachment of" and "substantive entitlement to" right to counsel).

The Court has expanded the right to counsel to pretrial events, but "only when new contexts appear presenting the same dangers that gave birth initially to the right itself." United States v. Ash, 413 U.S. 300, 311 (1973); see also, Powell, 287 U.S. at 70, quoting Ex

Parte Cin Loy You, 223 F. 833, 838 (D.C. 1915) (noting that Counsel Clause was inserted into the Sixth Amendment "because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner"). Accordingly, "[t]he Court has defined as 'critical stages' those petrial procedures that would *impair defense on the merits* if the accused is required to proceed without counsel." Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (emphasis added); see United States v. Gouveia, 467 U.S. 180, 188-90 (1984) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)); Evitts v. Lucey, 469 U.S. 387, 395 (1985) (emphasis added) (denial at critical stage when defendant's ability to "obtain a fair decision *on the merits*" is affected).

"The principle of Powell v. Alabama and succeeding cases," this Court has explained,

> requires that we *scrutinize any pretrial confrontation* of the accused *to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial* . . . and to have effective assistance of counsel at the trial itself.

United States v. Wade, 388 U.S. 218, 227 (1967) (emphasis added). These events "might appropriately be considered to be parts of the trial itself" because the results of these confrontations between the prosecutor and the defendant "might well settle the accused's fate and reduce the trial itself to a mere formality." Ash, supra, at 310; Maine v. Moulton, 474 U.S. 159, 170 (1985), quoting Wade, supra, at 224.

Hence, early on, the Court found to exist a "critical stage," at which assistance was denied, even *before* arraignment (i.e., even *before* commencement of Powell's critical period), where counsel's absence affected the defense *at trial*. Escobedo v. Illinois, 378 U.S. 478, 486 (1964), (citing Hamilton v. Alabama, 368 U.S. 52, 54 (1961)) (emphasis added) (extending Sixth Amendment guarantee to pre-indictment interrogation because "[w]hat happened at this interrogation could certainly affect the whole trial'").[3] Even the arraignment itself – which commences Powell's critical *period* – may not constitute a critical *stage*. Whether the arraignment is a "critical stage" depends upon its potential to impact the trial. Hamilton, 368 U.S. at 53-54; Coleman v. Alabama, 399 U.S. 1, 9-10 (1970); see Gerstein v. Pugh, 420 U.S. at 123 (emphasis added). (Hamilton and Coleman arraignments in Alabama were "critical stages" because "the suspect's *defense on the merits* could be compromised if he had no legal assistance"). Conversely, the Gerstein probable cause hearing was not a critical stage.

> Because of its limited function [addressing only pretrial custody] and the nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel.

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[3]The Court later narrowed the Escobedo holding. Kirby v. Illinois, 406 U.S. 682 (1972). Nonetheless, the rationale for determining the pre-arraignment stage to be critical appears to have remained unchanged.

Gerstein, 420 U.S. at 122.

Similarly, post-indictment identification procedures may, or may not, be "critical stages" implicating the Counsel Clause, depending upon whether they are likely to have trial consequences. A post-indictment line-up was a critical stage in Wade because of the "grave potential for prejudice . . . which may not be capable of reconstruction *at trial*." Wade, 388 U.S. at 236-37 (emphasis added).[4] Ash's post-indictment photographic display was not a "critical stage," though, because it did not pose the same risk of harm at trial. Ash, 413 U.S. at 321. The Court emphasized that applying the Sixth Amendment guarantee to a *non-adversarial* event like the photo display in Ash would be a "substantial departure" from the guarantee's historic application, because it:

> Would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee [would be] used . . . to produce confrontation at an event that previously was not analogous to an adversary trial.

Ash, 413 U.S. at 317. Similarly, the Counsel Clause is not implicated at pre-trial analyses of fingerprints, blood, clothing, hair, and the like, even if conducted during Powell's "critical period."

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[4]Indeed, even after reaching this conclusion the Court left open the possibility of harmless error if the in-court identification at trial derived from an independent source. Wade, 388 U.S. at 242.

> *[T]hey are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from [the defendant's] right to a fair trial.*

Wade, 388 U.S. at 227-28 (emphasis added); see Gilbert v. California, 388 U.S. 263, 267 (1967) (taking of handwriting exemplars not "critical stage" for same reason).

Finally, to be a "critical stage," counsel's absence at the event must risk *a significant impact* on the trial. In finding that the Gerstein probable cause hearing (addressing only pretrial custody) was not a "critical stage," this Court stated:

> To be sure, pretrial custody may affect *to some extent* the defendant's ability to assist in preparation of his defense, but this does not present the *high probability of substantial harm* identified as controlling in Wade and Coleman.

Gerstein, 420 U.S. at 123 (emphasis added).

Plea bargaining, though perhaps influenced by the "merits" of a case, is not itself a means of *testing the merits* of a case. The loss of the *potential* for pretrial disposition does not pose a "high probability of substantial harm" to the "merits of the defense" at trial, and does not "settle the accused's fate." The occasion of the forfeiture, therefore, does not ascend to a "critical stage" at which counsel's assistance is guaranteed. Until the acceptance of a plea offer is "embodied in the

judgment of the court," an opportunity has not arisen for "the prosecuting authorities to take advantage of the accused." Ash, 413 U.S. at 312-13. It simply is not realistic to believe that a prosecutor would *voluntarily* extend a *wholly discretionary* plea offer, and then work to prevent a defendant from accepting it, or that the prosecutor would extend the offer to an attorney and impede its conveyance to the defendant. Thus, the prosecutor's act in extending the offer and the defendant's consideration of it are entirely non-adversarial. These events, therefore, are not "critical stages" implicating the Counsel Clause. See Gerstein, 420 U.S. at 122 (probable cause determination not a critical stage because of "nonadversary character").

Even if "plea negotiations" as a whole are considered a singular "critical stage" of the proceedings, the forfeiture of pretrial disposition removes the criticality. "[T]here [are] times when the subsequent trial [will] cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant. In other words, such stages [are] not 'critical'." Ash, 413 U.S. at 315. Further, efforts to "eliminate the risks . . . to meaningful confrontation at trial *may also remove the basis for regarding the stage as 'critical'*." Wade, 388 U.S. at 239 (emphasis added). Indeed, "the opportunity to cure defects at trial causes the confrontation *to cease to be 'critical'*." Ash, 413 U.S. at 316 (emphasis added). The opposite is also true. An event that is normally "non-critical" can become "critical" if it is found to have trial consequences. White v. Maryland, 373 U.S. 59, 60 (1963) (Maryland's arraignment procedures may not affect trial in the way Alabama's do, but nonetheless

critical where plea of guilty entered at arraignment used against defendant at later trial).

Accordingly, rejecting the prosecutor's offered recommendation, even if due to attorney error, has "remove[d] the basis for regarding the stage as 'critical'." Wade, 388 U.S. at 239. To the extent that plea *acceptance* can amount to a "critical stage," passing on the plea deal causes the stage to "cease to be critical." Ash, 413 U.S. This is so because there is no possibility of derogation from the delivery of a fair trial, or to the ability to "obtain a fair decision on the merits." Evitts, 469 U.S. at 395. Simply put, unless plea negotiations bring about a conviction through the entry of a guilty plea and the forfeiture of trial, they do not "settle the petitioner's fate." Wade, 388 U.S. at 227.

An unexecuted plea bargain does not ascend to a "critical stage" at which the Counsel Clause guarantees counsel's assistance. To hold otherwise would be the "substantial departure" from, and the "drastic expansion of," the guarantee's historic application that this Court rejected in Ash. Ash, 413 U.S. at 317. Thus, error that results in the loss of the possibility of pleading guilty is not structural, and does not warrant automatic relief absent a showing of prejudice. Accordingly, the instant controversy should be governed by Strickland. See Smith v. Robbins, 528 U.S. 259, 287 (2000) (Strickland must be applied because claimed error does not fall within any of the three categories where prejudice is presumed).

III. ATTORNEY ERROR THAT CAUSES FORFEITURE OF POTENTIAL PLEA DISPOSITION DOES NOT CONSTITUTE *STRICKLAND* ERROR

Strickland prejudice cannot be shown in the foregone plea context. In the most general sense, the outcome may have been different had the defendant accepted and the court imposed the plea offer terms. But, a different result alone does not inform the prejudice inquiry.

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

> Thus, to show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" *of the trial.*

Nix v. Whiteside, 475 U.S. 157, 165 (1986), quoting Strickland, 466 U.S. at 694 (emphasis added).

A trial is rendered unfair or unreliable if the defendant is deprived of a "substantive or procedural right to which the law entitles him." Fretwell, 506 U.S. at 372. In Strickland, this Court enumerated several things to which "[a] defendant has no entitlement," and concluded that counsel error resulting in the loss of things to which there is no entitlement does not give rise to legitimate prejudice. Strickland, 466 U.S. at 694-95. In subsequent cases, the Court has further illuminated this principle.

In Nix, the Court held that where an attorney prevents his client from testifying falsely, Strickland prejudice is not established, even if the false testimony would have changed the outcome of the proceeding. Nix, 475 U.S. at 175-76. There is no entitlement to false testimony. It is not merely the lawlessness of the false testimony that makes it an improper basis for Strickland prejudice. Instead, false testimony is an improper basis for Strickland prejudice because it is within a broader category of things to which there is no entitlement. Fretwell, 506 U.S. at 370 n. 3.

Likewise, in Fretwell, the petitioner claimed that he would have enjoyed a "different outcome" if his attorney made an objection which would have been based, and sustained, upon an incorrect interpretation of the law. Fretwell, 506 U.S. at 366. Because there is no entitlement to incorrect interpretation of the law, the Fretwell petitioner was unable to show Strickland prejudice. Fretwell, supra, at 372; see also, Id. at 374-75 (*O'Connor, J.*, concurring) (prejudice inquiry "ought not be informed" by the loss of "an advantage the law simply does not recognize").

Williams v. Taylor, supra, 529 U.S. 362, presented the opposite problem. There, this Court overruled a determination that Strickland prejudice did not result from counsel error, even though the error *did* deprive the defendant of a right to which he *was* entitled. The lower court, misinterpreting Fretwell, erroneously imposed an additional requirement that fundament unfairness be shown – a showing that had already been made because it was established that counsel's error resulted in the loss of a substantive or procedural right.

Thus, consistent with the entire body of this Court's Counsel Clause jurisprudence, the Strickland test for prejudice requires that a breakdown in the adversary process be shown by the deprivation of something that the defendant was *entitled* to receive and the State was *obligated* to provide.

A. There is No Entitlement to Plea Disposition

This Court has unequivocally stated that a defendant does not have an entitlement to resolve his criminal case by plea bargain.

> There is no constitutional right to a plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.

Weatherford v. Bursey, 429 U.S. 545, 560-61 (1977). In granting relief in the foregone plea context, no court, including the Sixth Circuit below, has expressly challenged this rule. Some courts,. like the Sixth Circuit here, have impliedly rejected Weatherford because this Court has recognized plea bargaining's importance to the criminal justice system. Other courts, as in Nunes, supra, have reasoned that the plea offer, albeit unexecuted, becomes an entitlement once the State, in its discretion, extends it. These legal conclusions contradict this Court's precedents.

Some courts justify a departure from Weatherford by reasoning that the entitlement at issue is not the right to a guilty plea, but the "*right to counsel's assistance* in making an informed decision once a plea had been put on the table." Nunes, 350 F.3d at 1052 (emphasis added); see also, e.g., Ebron v. Commissioner of Correction, 120 Conn. App. 560, 582, cert. granted, 297 Conn. 912 (2010) (same). This reasoning is flawed in two ways. First, it turns "the right to counsel's assistance" in making the decision into the very entitlement protected by the Sixth Amendment's right to counsel's assistance. In other words, it makes the right "exist for its own sake." Contra Cronic, 466 U.S. 458. Second, it creates a constitutional entitlement derived from the State's discretionary act in extending the offer. Contra Mabry, 467 U.S. at 507-08.

"[T]here is a critical difference between an entitlement and a mere hope or expectation that the trial court will follow the prosecutor's [plea] recommendation." Id. at 508 n. 5. "In terms of the due process clause," the defendant's expectation "is simply

a unilateral hope." Dumschat, 452 U.S. at 465. "A constitutional entitlement cannot be created – as if by estoppel" – from the State's discretionary act. Id. Rather, "[t]he ground for a constitutional claim, if any, must be found in statutes or other rules defining the *obligations* of [the State]." Id. (emphasis added).

The State is not *obligated* to recommend pretrial disposition. Thus, the act of doing so does not create a constitutional entitlement "as if by estoppel," not only against the State, but against the judicial authority that typically retains the right to accept or reject the plea bargain, and, where applicable, against a victim who loses the opportunity to oppose the plea bargain. See Santobello v. New York, 404 U.S. 257, 262 (1971) (there is "no absolute right to have guilty plea accepted. . . . A court may reject a plea in exercise of sound judicial discretion"); Fed.R.Crim.Proc. 11 ("The court may refuse to accept a plea of guilty"); Michigan Rules of Court § 6302(c)(3) (same); CONN. CONST. Art. 1 § 8 (granting victims the right to oppose plea bargain through statement prior to court's acceptance).

Nor does the importance of plea bargaining constitutionalize it. The Sixth Circuit below, like many courts, rested its holding, in part, on this Court's recognition of the importance of plea bargaining to the administration of criminal justice. Santobello, supra, 261 (plea disposition is "not only an essential part of the process but a highly desirable one for many reasons."). Notwithstanding its utility, the Court has never held plea bargaining to have constitutional prowess superior to Weatherford's clear mandate that "there is no constitutional right to a plea bargain." Neither the

purpose nor history of plea bargaining suggests that the Court should do so now.

Plea bargaining is important because it promotes promptness and finality in criminal cases, avoids idle pre-trial confinement, protects the public from recidivist criminals, lends expediency to the process, and enhances rehabilitative prospects. Santobello, 404 U.S. at 261. Restoring a defendant's ability to procure the foregone plea after his guilt has been established at trial does nothing to advance these goals. Indeed, it impedes them. What was final becomes indefinite. The proceedings have been no more prompt, rehabilitative prospects no more enhanced, and pre-trial confinement no less idle, than had there been no plea offer to begin with. Finally, rather than affording protection from recidivism, the public becomes susceptible to a criminal who is released earlier than the time deemed warranted upon a full vetting, at trial and sentencing, of his conduct. Thus, the purpose of plea bargaining is not served by creating a constitutional right to it.

Additionally, the history of plea bargaining does not suggest that Weatherford should be reversed in order to find a constitutional entitlement to pre-trial disposition. The idea that a defendant could "bargain" for something in return for an admission of guilt would not have been foreign to the framers of the Constitution. "There is solid evidence of plea bargaining in earlier centuries." George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America, 12 (Stanford University Press, 2003). But, the Constitution is silent as to plea bargaining. Thus, in the criminal justice

system envisioned by the framers, all criminal cases would end in trial.

Modern plea bargaining, as a "systemic regime" in America, finds its roots in the early nineteenth century. Id. at 19-32. By 1970, at least seventy-five percent, and as many as ninety-five percent, of the criminal convictions in this country emanated from either charge bargaining or sentence bargaining. Brady v. United States, 397 U.S. 742, 752 & n. 10 (1970); Plea Bargaining's Triumph, supra, 12. This prevalence is explained by the "mutuality of advantage" offered by plea resolution. Brady, supra, at 752. It is because of this "mutual advantage" that this Court recognized plea bargaining as a constitutionally legitimate means of disposition. Bordenkircher v. Hayes, 434 U.S. 357, 363-64 (1978). The defendant limits his exposure, begins his term immediately, and avoids the practical burdens of trial. Id. For its benefit, the State preserves "scarce judicial and prosecutorial resources." Id. When a defendant is granted relief in the foregone plea context, the State, having met its constitutional mandate by providing a trial, has lost its part of the "mutual advantage." The State's discretionary plea offer and executory bargain have been converted into a unilateral constitutional entitlement secured by the Counsel Clause, even though it was never "embodied in the judgment of the court." Contra Mabry, 467 U.S. at 507. As such, the very basis for this Court's recognition of plea disposition as "legitimate" – the "mutual advantage" it provides – is gutted. Accordingly, neither the history of plea bargaining nor this Court's recognition of it justify its transformation into an entitlement.

B. There Is No Entitlement To Other Benefits Lost In The Foregone Plea Context

Courts often find prejudice from lost *benefits* or *advantages* that they predict *would have* otherwise inured to a defendant. For example, some courts, like the Sixth Circuit here, reason that the defendant *would have* enjoyed a shorter sentence (in the sentencing bargain context), or less severe charges (in the charge bargaining context, as in Frye). Some courts reason further that a defendant *would have* benefitted from earlier plea disposition because factors that played into his later sentencing – such as damaging pre-sentence investigation, criminal history, and victim input – *would have* remained unknown. See, e.g., Ebron, supra, 120 Conn. App. 560 (severe criminal history must be ignored because entry of earlier plea would have insured its secrecy). They then remedy the loss of these benefits to the defendant. In doing so, courts harness these benefits – "unilateral expectations" – with constitutional protections and transform them into entitlements, in contravention of so much of this Court's jurisprudence.

This Court long ago rejected the notion that a defendant is entitled to a sentence based on less than full exploration of his crime and his criminal history through pre-sentence investigation ("PSI") and victim input. Williams v. New York, 337 U.S. 241, 249-251, 69 S.Ct. 1079 & n. 14 (1949) (quoting Schwellenbach, Information vs. Intuition in the Imposition of Sentence, 27 J.Am.Jud.Soc 52 (1943)) (affirming trial court's imposition of death sentence over jury's more lenient recommendation, and noting that "[f]ailure to make full

use of [sentencing tools such as a PSI] cannot be justified."). Additionally, if a defendant is not entitled to "the luck of a lawless decisionmaker," Strickland, 466 U.S. at 695, it makes little sense to bestow upon him an entitlement to the luck of an uninformed one. Moreover, this Court has clearly stated that imposition of a sentence greater than that involved in the plea bargain, and commensurate instead with information later developed at trial, does not offend due process. Alabama v. Smith, 490 U.S. 794, 801 (1989). Simply put, the *benefit* of being sentenced upon less than full information is not a substantive or procedural *entitlement* that the Constitution allows a defendant to recapture.

In fact, there is no entitlement to a "lesser sentence" in any event. In Glover v. United States, 531 U.S. 198 (2001), the Court found Strickland prejudice to exist where "counsel failed to object to an *error of law*" in the sentencing calculation and the resulting sentence was legally incorrect. Id. at 204 (emphasis added). But, the Court made clear that:

> This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, would have been *correctable on appeal.*

Id. (emphasis added). As long as the sentence is within the range set by statute, "appellate review is at an end." Dorszynski v. United States, 418 U.S. 424, 431

(1974); See Townsend v. Burke, 334 U.S. 736 (1948) ("we are not [granting relief] because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on [habeas review]."); See also, Colten v. Kentucky, 407 U.S. 104 (1972) (due process not offended when trial *de novo* results in longer sentence). Thus, there is no entitlement to a "lesser sentence," as long as it is a legal sentence within the limits established by the statute under which the defendant is convicted.

Similarly, in the charge bargaining context, there is no entitlement to the lesser charges that a prosecutor offers to recommend (absent prosecutorial vindictiveness). United States v. Goodwin, 457 U.S. 368 (1982). Indeed, it makes little sense to create such an entitlement from the prosecutor's recommendation because, at the plea bargaining stage, "the prosecutor's assessment of the proper extent of prosecution may not have crystallized." Id. at 381. Put another way, absent a vindictive motive, there is no due process violation when a defendant is charged and convicted at trial of crimes greater than those contemplated by a plea recommendation, as long as the charges are justified given the criminal conduct and supported by the evidence. Id. at 382 ("the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution").

In short, in the foregone plea context, as in all these other areas, a constitutional deprivation cannot be based upon a prediction of benefits a defendant *would have* received; the deprivation must be shown by what

the State was obligated to provide and what the defendant was *entitled* to receive. Because there is no lost entitlement, Strickland prejudice cannot be shown.

IV. THIS ATTORNEY ERROR IS NOT CONSTITUTIONAL ERROR WARRANTING REVERSAL REGARDLESS OF AN EFFECT ON THE JUDGMENT

In the foregone plea context, there is neither "structural" nor Strickland-type trial error allowing the conclusion that the judgment is unreliable. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Delaware v. Van Arsdell, 475 U.S. 673, 681 (1986) (citing and quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

In limited contexts, this Court has recognized a need to reverse a conviction in the absence of error affecting the judgment – typically where law and public policy support the reversal. For example, in Rose v. Mitchell, 443 U.S. 545 (1979), the Court set aside a conviction because of racial discrimination in the selection of grand jurors, notwithstanding that the trial itself was error-free. The Court reasoned that racial discrimination is itself unconstitutional, and was the particular evil for which the Fourteenth Amendment was enacted to eliminate. While perhaps resulting in no error in the judgment against the defendant, the Court reasoned that the harm of racial discrimination within the mechanisms of justice is to society as a whole.

Similarly, the Fourth Amendment's proscription against unreasonable searches and seizures is a right enjoyed by all people, not just criminal defendants. Schneckloth v. Bustamonte, 412 U.S. 218, 267 (1973). Thus, the "exclusionary rule" requires that illegally seized evidence be excluded at trial, even if it is reliable evidence, and even if its exclusion results in acquittal. "The criminal is to go free," it is said, not because the judgment is unreliable, but "because the constable blundered." Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citation omitted). However, as with the unconstitutionality of racial discrimination at issue in Rose, "[t]he criminal goes free, if he must, but it is the [Fourth Amendment's proscription] that sets him free." Id. In each of these contexts, the State is directly responsible for the violation of a law, and tolerating such violations "breeds contempt for the law." Id. Moreover, the State actors in each scenario are accountable to the people through the political process; hence, the threat of reversing conviction to ensure that the State complies with the law is an effective deterrent to rogue State behavior.

Attorney error causing the loss of potential plea disposition involves no State action; there is no consequence to society as a whole; there is no underlying law broken; and the people can neither hold the attorney accountable nor effectively deter his error. To hold the people responsible for this error is the classic example of a reversal for error that had no effect on the judgment, and which, therefore, "bestirs the public to ridicule" the criminal justice system and "breeds contempt for the law." First, the criminal avoids the penalty that employment of the adversarial

process has determined to be most effective because it is commensurate with his conduct. See Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (re-indictment on more serious charges after breakdown in plea negotiations is not a due process violation where later conviction and sentence are commensurate with criminal conduct). This is the very windfall to which this Court has said a criminal defendant is not entitled. Fretwell, 506 U.S. at 369-70. Second, it requires the people to exceed their constitutional mandate. See Evitts v. Lucey, 469 U.S. at 396. Thus, there is no justification for reversing a conviction in this context where there is no error upon the judgment.

The inquiry in this foregone plea context ends where it begins. Attorney error does not alter the fact that the State is not obligated to provide, and the defendant is not entitled to receive, pretrial plea disposition.

V. CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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April 21, 2011

AMICUS CURIAE BRIEF

Nos. 10-444 & 10-209

Supreme Court, U.S.
JUL 22 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Missouri, Western District

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BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE CONSTITUTION PROJECT *AS AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of Respondent Galin Frye (Docket Number 10-444) and Respondent Anthony Cooper (Docket Number 10-209).

The Constitution Project achieves its goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the National Right to

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' consent for *amicus curiae* to submit a brief in this proceeding are filed with this brief.

[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice,

North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in support of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County, Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exonoree; **Dr. Tony Fabelo**, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida,

Counsel Committee's mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of this Court, and rules of the legal profession.

The National Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the vindication of the right to counsel nationwide, and based on those findings, made twenty-two

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represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

substantive recommendations for reform.[3] The Committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when states fail to comply with those requirements. *See id.* at 183-200, 210-213. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. *See id.* at 200-209. *Justice Denied* has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a wide array of public figures. *See e.g.*, Editorial, *The Sorry State of Indigent Defense*, WASH. POST, Dec. 9, 2010; Steven Zeidman, *Indigent Defense: Caseload Standards*, NEW YORK LAW JOURNAL, Mar. 24, 2010 *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Attorney General Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html.

Accordingly, The Constitution Project has an interest as *amicus curiae* in these two important cases regarding the Sixth Amendment right to counsel currently pending before the Court.

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[3] *Justice Denied* is available on The Constitution Project's website, *www.constitutionproject.org*.

SUMMARY OF ARGUMENT

Because the overwhelming majority of criminal cases are settled through plea bargaining, effective assistance of counsel during that process is critical to the overall administration of justice. This is particularly true for indigent defendants who, because of the chronic underfunding of indigent defense systems, are more likely than others to accept a plea bargain.

The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court expressly recognized that the Sixth Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. *See also Premo v. Moore*, 131 S. Ct. 733 (2011) (applying ineffective assistance of counsel test, but finding no violation, where defendant accepted a plea offer before his lawyer moved to suppress a supposedly illegally obtained confession); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010) (applying ineffective assistance test and finding Sixth Amendment violation where immigrant defendant pled guilty, on his lawyer's advice, to a felony that made him subject to deportation). While the law in this area is well-established and imposes a substantial burden on the defendant to show that an error by his counsel was of a constitutional dimension, the courts below correctly found that the Respondents had carried that burden.

Contrary to Petitioners' argument, a subsequent trial or plea colloquy that is consistent with Sixth Amendment norms cannot cure a constitutional violation of the right to counsel that occurred at the prior plea bargaining stage. It is the adversarial

process itself, not a trial alone, to which a defendant's Sixth Amendment right to counsel is tied. As such, an analysis of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), focuses on whether counsel's ineffective assistance caused a breakdown in the adversarial process as a whole—not just whether the ineffective assistance prevented the defendant from ultimately receiving a fair trial.

The adversarial process breaks down where, as here, a defendant's counsel fails him anywhere in the plea process and, as a result, the defendant receives a sentence substantially greater than he otherwise would have had he not been denied his constitutional right to counsel. In such a case, reinstatement of the original plea offer comes as close as possible to redressing the constitutional harm. Such a remedy, which courts routinely grant, is constitutionally permissible and indeed is consistent with this Court's holding in *United States v. Morrison*, 449 U.S. 361, 364 (1981), that remedies for the deprivation of the Sixth Amendment right to counsel should be tailored to the injury suffered from the constitutional violation.

ARGUMENT

I. This Court Has Long Recognized That A Defendant Has A Constitutional Right To Effective Assistance Of Counsel During Plea Bargaining.

A. Plea Bargaining Is A Critical Stage Of A Criminal Prosecution.

The dominance of plea bargaining in the modern criminal justice system led two scholars to conclude that "[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice

system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (emphasis added). The numbers certainly support that conclusion. In 1984 (the year *Strickland* was decided), the percentage of criminal convictions in federal court secured pursuant to pleas was already 87.14%. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.22.2010.[4] By 2010, of the 89,741 criminal convictions in federal district court, 97.4% (87,418) were disposed of pursuant to pleas of guilty or *nolo contendere*. *Id.* Similarly, in 2006 (the last year for which such statistics are available), 94% of all felony convictions in state courts were by guilty plea. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.46.2006.[5]

The prevalence of plea bargaining over the last several decades has fundamentally altered the modern criminal justice system. Whereas the system originally was premised on confrontation at trial, plea bargaining has supplanted the jury trial, and the full panoply of rights that follows, as the primary mode of resolving criminal prosecutions. As a result, the main function of defense counsel in the vast majority of cases has become the negotiation of an effective plea bargain.

As this Court has observed, disposition of charges through a plea is not only an essential part of the process, but a highly desirable one:

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[4] Available online at http://www.albany.edu/sourcebook/pdf/t5222010.pdf.

[5] Available online at http://www.albany.edu/sourcebook/pdf/t5462006.pdf.

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971). However, "all of these [benefits] presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* For the plea bargaining *process* itself to be fair, as contemplated in *Santobello*, constitutionally effective assistance of defense counsel is required during that process.

In *United States v. Wade*, 388 U.S. 218 (1967), the Court explained that the right to effective assistance of counsel extended to all "critical stages" of a criminal proceeding. Not surprisingly, given its observation in *Santobello*, this Court has recognized that plea bargaining is a critical stage of a criminal prosecution: "We have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486 (2010) (emphasis in original); *see also Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 3385 ("The plea bargaining process is a critical stage of a criminal prosecution."). Because the decision to enter a guilty plea "ranks as a 'critical stage' at which the right to counsel adheres," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), it

necessarily follows that a decision to reject a guilty plea is also a critical stage at which the right to effective assistance of counsel adheres. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("We have held that entering a guilty plea . . . is a critical stage . . . . It seems to us that the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). As the Supreme Court of California has similarly stated:

> Both alternate decisions—to plead guilty or instead to proceed to trial—are the products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

In re Alvernaz, 830 P.2d 747, 753-54 (Cal. 1992).

To achieve fair and reliable results, the criminal justice system relies upon defense counsel to effectively navigate plea negotiations and the plea process. This unquestionably includes communicating plea offers to the client as well as accurately applying the applicable law when advising the client to reject or accept a plea. A defendant who, through the error or neglect of counsel, does not accept a plea bargain that is more favorable than the conviction and sentence he ultimately receives is prejudiced when he loses the benefit of that initial bargain. Similarly, a defendant is prejudiced if, through the error or neglect of counsel, he rejects a plea, goes to

trial, and is convicted of multiple charges or charges for a higher offense. Indeed, the practice of overcharging, which commonly is employed by prosecutors to encourage defendants to settle the case through a plea, can easily prejudice a defendant who does not accept a plea offer due to counsel's ineffective performance.

Because the overwhelming majority of criminal cases are settled through the plea process, counsel's effective assistance to his client during this process is critical to the overall administration of justice. The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. The Court's well-established precedent that a defendant must show that counsel did not exercise reasonable competence in representing him, *Strickland*, 466 U.S. at 688, is sufficiently rigorous in the plea bargaining process to prevent ineffective assistance of counsel claims from deteriorating into post-sentencing expressions of "defendant's remorse."[6] Thus, under the Court's

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[6] Indeed, the strictness of the *Strickland* standard has led many critics to argue that it undermines defendants' Sixth Amendment rights. *See* Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009) (arguing *Strickland*'s prejudice prong "needs to be eliminated rather than re-tooled"); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93-94 (1994) (contending that the *Strickland* line of decisions has "undermined, if not virtually destroyed, the right of indigent accused" to have reasonably competent counsel and describing *Strickland* as having been "roundly and properly criticized for fostering tolerance of abysmal lawyering"). In practice, the prejudice prong of *Strickland* has served to deny relief to victims of even the most egregious forms of attorney misconduct.

decisions, not every error or neglect by counsel in the plea bargaining process is sufficient to state an ineffective assistance claim. Rather, the defendant must carry the heavy burden of showing that counsel's failure to demonstrate reasonable competence was of constitutional dimension. *See Premo*, 131 S. Ct. at 741 (holding that "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargaining stage.").

B. Contrary To Petitioners' Argument, *Strickland* And Its Progeny Recognize Forms Of Prejudice Other Than The Deprivation Of A Fair Trial.

Petitioners claim that the only cognizable form of prejudice under *Strickland* is the denial of a fair trial. Pet. State of Missouri Br. 18-25 & Pet. Lafler Br. 13-20. This position is refuted by this Court's precedent, including *Strickland* itself. *See Strickland*,

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See United States v. Voigt, 877 F.2d 1465, 1467 (10th Cir. 1989) (relief denied where counsel used Demerol throughout trial); *Curnutt v. State*, No. M2009-00346-CCA-R3-PC, 2010 WL 565670, at *7 (Tenn. Crim. App. Feb. 18, 2010) (no relief where lead counsel fell asleep at least twice during trial); *Graley v. State*, 582 So. 2d 811, 812 (Fla. Dist. Ct. App. 1991) (Garrett, J., concurring) (denied relief where counsel was under the influence of cocaine during plea negotiations); *Dorsey v. State*, 739 P.2d 528, 529-30 (Okla. Crim. App. 1987) (no relief where both trial judge and prosecutor admitted smelling alcohol on defense counsel's person). Accordingly, The Constitution Project's National Right to Counsel Committee has called for the *Strickland* standard to be replaced by a straightforward test for determining ineffective assistance of counsel that would simply ask whether the accused received "competent" and "diligent" representation, as required by the rules of professional conduct adopted by the legal profession. *Justice Denied* at 212-213.

466 U.S. at 686; (holding that a Sixth Amendment violation can occur at sentencing), *Hill*, 474 U.S. at 57 (holding that a Sixth Amendment violation can occur at the plea bargaining stage). Additionally, Petitioners' contention that a conviction at fair trial or guilty plea subsequent to a Sixth Amendment violation cures that violation is not supported by the decisions of this Court or the circuits that have considered the issue. *See Strickland* at 696 (holding that the prejudice inquiry turns on whether "the decision reached would reasonably likely have been different absent the errors"); *Williams*, 571 F.3d at 1091 (same); *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007) (same); *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (same); *United States v. Garivia*, 116 F.3d 1498, 1514 (D.C. Cir. 1997) (per curiam) (same); *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (same); *Coulter v. Herring*, 60 F.3d 1499, 1504 & n.7 (11th Cir. 1995) (same); *United States v. Brannon*, 48 Fed. Appx 51, 53 (4th Cir. 1994) (per curiam) (same); *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) (same); *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992) (same); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 751 & n.1 (1st Cir. 1991) (per curiam) (same); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (same).

Under *Strickland*, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." *See Strickland*, 466 U.S. at 694 (emphasis added). As noted above, this Court unequivocally stated in *Hill v. Lockhart* that the Sixth

Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. 474 U.S. at 57. Further, in *Iowa v. Tovar*, this Court explicitly confirmed that plea bargaining is a "critical stage" of criminal proceedings for Sixth Amendment purposes. *See* 541 U.S. at 80-81; *see also Premo*, 131 S. Ct. at 741. And, further eroding Petitioners' argument, plea bargaining is not the only part of a criminal proceeding outside of the trial to which the right to effective assistance of counsel attaches. Indeed, this Court has long recognized that the *Strickland* line of cases applies to criminal proceedings as a whole, not simply the actions of counsel between opening and closing statements. *See Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) (applying *Strickland* to sentencing); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (applying *Strickland* to appeals process).

It is the adversarial process as a whole, not a trial alone, that secures a defendant's Sixth Amendment rights, and a variety of errors and omissions during the process can lead to constitutional ineffectiveness. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656 (1984) (stating that insufficient time for trial preparation, even without any specific allegation of deficient performance, can serve as a basis for an ineffective assistance claim); *Strickland*, 466 U.S. at 686 (holding that deficient performance at a capital sentencing hearing can give rise to an ineffective assistance claim); *Morrison*, 449 U.S. at 364-65 (compiling cases in which pre-trial violations of the Sixth Amendment occurred). As such, an analysis of prejudice under *Strickland* focuses not on a particular point in a criminal prosecution at which counsel's assistance was ineffective, but rather whether the result of that ineffective assistance caused a break-

down in the adversarial process as a whole. *See Strickland*, 466 U.S. at 696 ("the ultimate focus of inquiry [in an ineffective assistance of counsel claim] must be on the fundamental fairness of the proceeding whose result is being challenged"); *see also Cronic*, 466 U.S. at 656 (announced the same day as *Strickland*, holding that "if the *process* loses its character as a confrontation between adversaries, the constitutional guarantee has been violated.)" (emphasis added); *Morrison*, 449 U.S. at 363 (the right to counsel is "fundamental to our system of justice" and is "meant to ensure fairness in the adversary criminal *process*") (emphasis added). When an attorney's incompetence robs an individual of his right to a fair, adversarial process, that individual's Sixth Amendment rights have undoubtedly been violated. *See Cronic*, 466 U.S. at 656.

All circuits that have addressed the issue have held that a defendant who rejects a plea deal as a result of his lawyer's constitutionally deficient performance and proceeds to trial has been prejudiced if the sentence he receives at trial is higher than the sentence offered in the plea deal. *See Williams*, 571 F.3d at 1091; *Julian*, 495 F.3d at 498; *Wanatee*, 259 F.3d at 703-04; *Garivia*, 116 F.3d at 1514; *Boria*, 99 F.3d at 498-99; *Coulter*, 60 F.3d at 1504 & n.7; *Brannon*, 48 F. App'x at 53; *Blaylock*, 20 F.3d at 1468; *Day*, 969 F.2d at 45; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1; *Beckham*, 639 F.2d at 267. We are aware of no federal precedent supporting Petitioners' contention that the only form of prejudice recognized under *Strickland* is the denial of a fair trial. Indeed, as the Sixth Circuit in *Lafler* stated, "[N]o federal circuit case holds so." *See Cooper v. Lafler*, 376 Fed. Appx 563, 572 (6th Cir. 2010), *cert. granted*, 131 S.

Ct. 856 (No. 10-209, 2011 Term) (quoting *Williams*, 571 F.3d at 1093).

Petitioners' argument that any ineffective assistance of counsel was remedied by the subsequent plea that Frye entered into and the trial Cooper received similarly fails. This Court in *Strickland* found that "mechanical rules" like the one Petitioners propose are inapplicable in ineffective assistance of counsel cases. 466 U.S. at 696; *see also Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (rejecting the contention that a subsequent fair trial remedied a violation of the 14th Amendment caused by racial discrimination in grand jury selection). Moreover, as noted, *Strickland* stated that it is not the fairness of the trial alone, but rather of the proceedings as a whole that is dispositive. 466 U.S. at 696. At least three circuits that have considered the issue have specifically rejected the notion that a fair trial cures ineffective assistance of counsel at the plea bargaining stage. *See Blaylock*, 20 F.3d at 1466; *Day*, 969 F.2d at 44; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1. As the Third Circuit stated in *Day*, the "Sixth Amendment right to effective counsel guarantees more than the Fifth Amendment right to fair trial." 969 F.2d at 45.

In sum, a proceeding is not fundamentally fair when a defendant receives a sentence substantially greater than he otherwise would have had his constitutional rights not been violated in the plea bargaining process. This type of prejudice is cognizable under the Sixth Amendment.

C. Frye And Cooper Each Have Met The Standard For Establishing Ineffective Assistance Of Counsel As Set Forth In *Strickland*.

At a minimum, effective assistance requires informing the defendant of the existence of a plea offer and advising the defendant to reject or accept an offer based on accurate and complete information and legal analysis. *See Julian*, 495 F.3d at 497 (holding that advising a client based on a misreading of clear precedent constitutes deficient performance); *Blaylock*, 20 F.3d at 1465-66 (failure to inform defendant of a plea offer constitutes deficient performance). And, as explained above, prejudice is established when a defendant receives a significantly longer sentence than he otherwise would have absent his attorney's constitutionally deficient performance. *Caruso*, 689 F.2d at 438.

Frye's attorney's failure to convey the plea offer to his client fell below an "objective standard of reasonableness," the benchmark set by this Court for determining ineffective assistance of counsel. *See Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688). The Missouri Supreme Court, finding the record devoid "of *any* evidence of *any* effort" to inform Frye of the plea offer, held that the performance of Frye's attorney was constitutionally deficient under the first prong of the *Strickland* test. *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (emphasis in original). Other courts have similarly concluded that the failure to inform the defendant of the very existence of a plea offer constitutes deficient performance. *See, e.g., Blaylock*, 20 F.3d at 1465-66; *Rodriguez*, 929 F.2d at 752. The decision of whether to accept a plea offer was Frye's to make. The failure

to even make him aware of such an offer, however, constitutes both "a gross deviation from accepted professional standards" generally, and deficient performance of counsel under *Strickland* specifically. *Caruso*, 689 F.2d at 438.

Furthermore, Frye was clearly prejudiced by his attorney's failure to convey the plea offer when he received a three-year sentence from the court—two years longer than the maximum sentence he could have received under the plea that was never communicated to him. *Frye*, 311 S.W.3d at 352-53; *see also Caruso*, 689 F.2d at 438 (prejudice is established when a defendant receives "a significant additional term of imprisonment that resulted from counsel's failure to communicate the plea offer which he would have accepted").

Cooper was likewise denied effective assistance of counsel when his attorney incorrectly informed him that the evidence in his case could not possibly support a conviction for the crime with which he had been charged. Cooper was convicted at trial. Had Cooper accepted the plea offer, the prosecution would have recommended a sentence of between 51 to 85 months. Instead, Cooper was sentenced to a term of 185 to 360 months. *Id.* at 563, 567.

Cooper's attorney gave him advice that fell below the objective standard of reasonableness. *See Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of felony murder rule constitutes deficient performance). The Sixth Circuit found that the claim of Cooper's attorney about the dispositive nature of a victim's injuries in determining intent under Michigan law was clearly wrong, citing multiple long-standing Michigan cases in direct opposition. *Cooper*, 376 F. App'x at 567. "Providing

such erroneous advice in the face of settled Michigan law is obviously deficient performance," the circuit court held. *See id.* Other circuits have found the deficient performance prong met when attorneys gave their clients incorrect or even incomplete advice. *Julian*, 495 F.3d at 497 (finding that the misreading of unambiguous precedent on a factor in sentencing constitutes deficient performance); *Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of the felony murder rule constitutes deficient performance). As such, the clearly erroneous advice given by Cooper's attorney on a seminal legal point constitutes constitutionally deficient performance under the *Strickland* standard.

Cooper was prejudiced by this deficient performance. The court below found that the evidence supported Cooper's assertion that he would have pled guilty had he been fully and accurately informed of the governing law. *Cooper*, 376 F. App'x at 571-72. Cooper was prejudiced when he acted upon his attorney's erroneous statement of the law, went to trial, was convicted, and as a result received a sentence much longer than he would have absent the incorrect advice. *See Wanatee*, 259 F.3d at 704 (holding that the defendant can establish prejudice by showing "that he would have accepted the plea but for counsel's advice, and that had he done so, he would have received a lesser sentence").

In short, Frye and Cooper's Sixth Amendment rights were violated when they received ineffective assistance of counsel during the plea bargaining process. Their attorneys' performance fell well below an objective standard of reasonableness, and they were prejudiced by their attorneys' errors. *See Wanatee*, 259 F.3d at 704; *Blaylock*, 20 F.3d at 1467. As such,

both Respondents have met the well-established standard for ineffective assistance of counsel set forth by this Court in *Strickland*, and extended to the plea process in *Hill v. Lockhart*. The Court should apply that settled law and affirm the decisions below.

II. Because Indigent Defendants Plead Guilty At An Even Higher Rate Than Others, Petitioners' Proposed Standard For Prejudice Would Deprive Most Indigent Defendants Of Full Protection Under The Sixth Amendment.

For the overwhelming majority of criminal defendants whose criminal charges will be resolved through the plea process rather than trial, the need for effective assistance of counsel is greatest during plea bargaining. This is particularly true for indigent defendants who, because of a systemic lack of resources, are more likely to accept a plea bargain. *See* U.S. Department of Justice, *Defense Counsel in Criminal Cases* Table 17 (2000) (finding that federal and state prison inmates represented by court-appointed lawyers were more likely to plead guilty than those represented by private lawyers).[7]

Under Petitioners' proposed prejudice standard, the plea process itself would not be subject to the Sixth Amendment unless counsel's constitutionally inadequate representation ultimately resulted in the deprivation of a fair trial. Such a limitation on the Sixth Amendment right to counsel would fall most heavily on indigent defendants for the simple reason that they are the least likely to proceed to trial.

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[7] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

In *Gideon v. Wainwright*, this Court ruled that the Sixth and Fourteenth Amendments of the Constitution guarantee the provision of counsel to indigent persons accused of a crime in state felony proceedings. 372 U.S. 335 (1963). However, almost five decades later, the indigent defense system in the United States is in a state of crisis, threatening compliance with this Court's ruling in *Gideon*.[8] Defense services in criminal and juvenile cases are woefully underfunded, resulting in a system that inadequately compensates assigned counsel; pressures defendants to waive counsel; assigns incompetent or inexperienced counsel; appoints counsel late in the process; understaffs public defense offices; and fails to provide defense counsel sufficient investigative resources. As a result, many indigent defense systems fail to provide constitutionally adequate representation, and the promise of equal justice under the law remains elusive.

Inadequate funding is the most debilitating problem in the administration of indigent defense. Even before the economic downturn beginning in 2008, many states that fund their own indigent defense

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[8] The problems in indigent defense are well known and widely studied and documented in *Justice Denied*. In addition, in 2003, to commemorate the fortieth anniversary of *Gideon v. Wainwright*, the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association ("ABA") undertook to examine the state of indigent defense since *Gideon*. It held hearings at four different locations across the country to document indigent defense problems, including excessive caseloads. Numerous witnesses from several states testified. The resulting report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004) (hereafter *Gideon's Broken Promise*), revealed numerous impediments in the delivery of indigent defense services.

systems (rather than relying on county funding) had actually decreased their support of these defense systems.[9] With the budget shortfalls resulting from the 2008 economic downturn, that trend can only have continued.

The inadequate funding for indigent defense systems is readily apparent when one closely examines the disparity between funding for prosecution services versus funding for indigent defense. For example, in 2007, the Spangenberg Group conducted a study in Tennessee comparing the overall resources allotted to prosecution and defense. The Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (2007).[10] The study concluded that total prosecution funding that could be attributed to indigent cases ranged between $130 and $139 million for fiscal year 2005, while funding for indigent defense totaled approximately $56.4 million. *Id.*

Because of inadequate funding, indigent defense attorneys in much of the United States are burdened with excessive caseloads. Professional rules of conduct governing lawyers require that an attorney's workload be controlled to allow for competent representation in each case. American Bar Association, Model Rules of Prof'l Conduct R. 6.I (2007). Guidelines issued by the National Legal Aid and Defender Association (NLADA) similarly require that, prior to accepting an appointment, defense attorneys ensure they have adequate time available

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[9] *Justice Denied* at 59.

[10] Available online at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7_30_07.authcheckdam.pdf.

to provide quality representation. NLADA, Performance Guidelines For Criminal Def. Representation (4th Printing). In reality, however, workloads for indigent defense counsel far exceed these national standards, and excessive caseloads continue to plague indigent defense systems across the country. *See* U.S. Department of Justice, *State Public Defender Programs*, 2007 13, 18 (2009); U.S. Department of Justice, *County-based and Local Public Defenders Offices, 2007* 8 (2010).[11]

As a result of overwhelming workloads, there is increased pressure on defense attorneys representing indigents and, in turn, their clients to accept guilty pleas to expedite the movement of cases. Another byproduct of excessive workloads is error, including during the plea process, because counsel simply does not have the time or resources to perform effectively.

In *Strickland*, the Court recognized that the obligation of counsel to provide effective assistance entails "certain basic duties," including advocating the defendant's cause, demonstrating loyalty to the client, avoiding conflicts of interest, consulting with the defendant on important decisions, keeping the defendant informed of important developments, conducting reasonable factual and legal investigations, and bringing to bear the necessary skills and knowledge. 466 U.S. at 688. When lawyers handle an excessive number of cases, however, they are forced to spend their time in court as well as handling emergencies and other matters that cannot be postponed. As a result, they are unable to perform essential tasks such as client interviews, legal research, drafting

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[11] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

motions, requesting investigative or expert services, interviewing witnesses, and preparing for hearings. *Gideon's Broken Promise* 19.

In Missouri, a study commissioned by the Public Defender Commission found that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representations] and their ethical obligations and responsibilities as lawyers." *Justice Denied* 69 (citing The Spangenberg Group, *Assessment of the Missouri State Public Defender System* 7 (2005)). The Missouri State Public Defender Deputy Director stated that 2004 caseloads required trial public defenders to dispose of a case every 6.6 hours of every working day. *Id.* These caseloads led the Missouri Public Defender Commission in 2007 to promulgate an emergency regulation, which became permanent the following year, that would allow it to limit the ability of an overloaded district public defender office to accept additional cases. MO. CODE REGS. ANN. tit. 18, §10-4.010. Here, Frye was represented by the public defender's office of Columbia, Missouri.

Similarly, NLADA released a report regarding Michigan's public defense system in 2008, finding that, "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts." NLADA, *Evaluation of Trial-Level Indigent Defense Systems in Michigan, A Race to the Bottom* (Jun. 2008).[12] Some of the problems plaguing the system were due to excessive caseloads. *Id.* at 57-70. The Michigan Campaign for Justice concluded: "Across the state, attorneys have

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[12] Available online at http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf.

caseloads well above the national standards. In one county, a misdemeanor contract firm handles so many cases that the attorneys spend an average of 32 minutes per case." Cooper was indigent and represented by counsel appointed to him by the Michigan Circuit Court for Wayne County.

As noted, when attorneys have too many cases, they often are unable to comply with their professional duty to keep clients informed of the status of their case and promptly respond to client requests for information. In fact, many indigent defense attorneys do not meet with their client until the day the client enters a guilty plea and is sentenced. *Gideon's Broken Promise* 16. Testimony collected by the ABA's Standing Committee on Legal Aid and Indigent Defendants reveals just how little client contact defense attorneys have with their clients. A study of all felony cases over a five-year period in Quitman County, Mississippi showed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment, which was the first day the attorney met the client. *Gideon's Broken Promise*, 16 & n.150 (citing testimony of Robert McDuff).

Furthermore, excessive caseloads can lead to attorney mistakes that seriously undermine a client's right to counsel. This is particularly likely when the attorney is inexperienced in the practice of criminal law. In California, a statewide survey of judges and indigent defense attorneys conducted for the California Commission on the Fair Administration of Justice found a "statistically significant correlation between having an excessive caseload and using attorneys with less than [three] years [of] experience" to handle serous felony and "three-strike" cases. *Justice Denied* 69 (quoting Laurence A. Benner and Lorena S. Stern,

Systemic Factors Affecting the Quality of Criminal Defense Representation: Preliminary Report to the California Commission on the Fair Administration of Justice 29 (2007)).[13]

Indigent defense attorneys also frequently lack access to and funding of important services such as experts, investigators, and interpreters. *Justice Denied* 93-94; *Gideon's Broken Promise* 10-11. As the Court recognized in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." The lack of non-lawyer services severely hampers the ability of defense attorneys to effectively negotiate a plea deal with the prosecution, especially because prosecutors have open access to the services of state and federal law enforcement and experts.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strick-*

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[13] Other states report similar experiences. In Alabama, newly-minted attorneys just out of law school are reportedly just as likely as experienced attorneys to be assigned to serious cases, even homicide prosecutions. *Justice Denied* 92, n.251 (citing *Gideon's Broken Promise* at 58-62). Similarly, in 2007 in Caddo Parish, Louisiana, new public defenders with no training were assigned existing caseloads of their predecessors, regardless of prior experience. One attorney, right out of law school, started with a caseload of 270 felony drug cases. *Id.* n.257 (citing The Spangenberg Group, *Review of the Caddo Parish Indigent Defender Office* 11 (2007)).

land, 466 U.S. at 685. Because the overwhelming majority of criminal cases settle through plea bargaining, the right to counsel during plea bargaining plays a crucial role in the adversarial system. For the institutional reasons described above, however, it is indigent defendants who bear the brunt of inadequate public defense resources and the consequent ineffective representation during the plea process. Indeed, without appropriate resources and time to investigate, meet with the client, and conduct legal research, counsel cannot effectively advise a client whether to accept a plea offer.

III. The Logical Remedy For Ineffective Assistance Of Counsel During Plea Bargaining Is To Give The Defendant The Benefit Of The Lost Bargain.

In *Morrison*, 449 U.S. at 364, this Court ruled that violations of the Sixth Amendment are subject to the general rule that remedies be tailored to the injury suffered from the constitutional violation and not unnecessarily infringe on competing interests. Chief among those competing interests is society's interest in pursuing the administration of criminal justice. *Id.* There is no persuasive reason to depart from this general rule for cases involving plea negotiations. Where a defendant fails to enter a plea bargain because of the constitutionally deficient performance of his attorney, his injury is the lengthier sentence that is imposed. The remedy properly tailored to this injury is providing the defendant the benefit of the lost plea offer. As such, Frye and Cooper should be allowed to accept the original pleas because such a remedy comports with the rule set out in *Morrison*.

In *Blaylock*, 20 F.3d at 1468, the Ninth Circuit reasoned that where a defendant was deprived of the opportunity to accept a plea offer, putting him in the position he was prior to the Sixth Amendment violation usually will involve reinstating the original offer. Here, granting Frye and Cooper the option to go to trial would not remedy the deprivation of the right to counsel. Reinstatement of the original plea offer is the only remedy that comes as close as possible to redressing the constitutional harm, and doing so does not unnecessarily offend any competing interest.

Contrary to Petitioners' argument, requiring the government to reinstate its original plea offer is constitutionally permissible, and has been found so by many courts. *Santobello v. New York*, 404 U.S. at 263; *Blaylock*, 20 F.3d at 1468 (citing *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984)); *United States v. Partida-Parra*, 859 F. 2d 629, 635 (9th Cir. 1988). For example, in *Santobello*, the defendant was indicted on two felony counts under New York law. After negotiations, the Assistant District Attorney in charge of the case agreed to permit the defendant to plead guilty to a lesser-included offense and further agreed to make no recommendation as to the sentence. At the defendant's appearance for sentencing months later, a new prosecutor recommended the maximum sentence, which the judge imposed. The defendant appealed the sentence on the grounds that the State had promised that there would be no sentence recommendation by the prosecution. This Court found for the defendant, holding that when a guilty plea was induced based on a promise of the prosecutor, the promise must be fulfilled. *Santobello*, 404 U.S. at 262. In determining the appropriate remedy, the Court found that "the interests of justice and appropriate recognition of the duties of the

prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts" for further consideration as to whether the circumstances required that there be specific performance of the agreement on the plea, or if the defendant should be allowed to withdraw his guilty plea. *See id.* at 262-263. Either way, the Court made it clear that courts have remedial power to order that the defendant be given the benefit of the lost bargain.

Lower courts routinely require defendants to be allowed to accept a plea offer where counsel's incompetence was the reason the defendant did not accept the offer in the first place. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 & n.7 (6th Cir. 2006) (affirming lower court decision to release defendant after government defied conditional writ requiring reoffer of original plea agreement); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003) (requiring government to reoffer identical plea agreement or release defendant within 120 days); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 797-99 (S.D. Cal. 1993) (requiring government to reoffer original plea deal or release defendant within 30 days).

CONCLUSION

The Court should affirm the holdings of the lower courts that Frye and Cooper received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments and remand the cases with instructions that Frye and Cooper be allowed to accept the original plea offers.

Respectfully submitted,

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July 22, 2011

AMICUS CURIAE BRIEF

Nos. 10-209 and 10-444

IN THE

Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

vs.

ANTHONY COOPER,

Respondent.

MISSOURI,

Petitioner,

vs.

GALIN E. FRYE,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Missouri Court of Appeals

BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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IN THE

Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

vs.

ANTHONY COOPER,

Respondent.

MISSOURI,

Petitioner,

vs.

GALIN E. FRYE,

Respondent.

BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* CJLF and NDAA made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

Respondents' convictions in the present cases were the result of fair, reliable, and constitutionally adequate criminal proceedings. The rulings below reversed the convictions because Respondents were able to show that a more competent attorney might have obtained a more lenient sentence. These rulings, if affirmed, would significantly undermine the finality of criminal convictions and grant criminal defendants a windfall to which the Sixth Amendment does not entitle them. This result would be contrary to the rights of victims and society that CJLF was formed to protect and that NDAA's members have a duty to protect.

SUMMARY OF FACTS AND CASE

Lafler v. *Cooper*, No. 10-209

On March 25, 2003, around 7:30 in the evening, Kali Mundy was shot twice as she was running away from the assailant. *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 565 (CA6 2010). She sustained life-threatening injuries, but survived. *Ibid.* Mundy identified Respondent Anthony Cooper, an acquaintance, as the shooter. *Ibid.*

Cooper was charged with several counts, including assault with intent to murder and possession of a firearm by a felon. *Ibid.* The prosecutor verbalized a plea offer to Cooper's defense attorney that would have allowed Cooper to plead guilty to assault with intent to murder and face a below-guideline minimum sentence of 51 to 85 months. *Id.*, at 566. Cooper initially wanted to accept the plea bargain "because he 'was guilty.' " *Ibid.* His attorney advised him not to accept the offer, based on a mistaken understanding of the prosecutor's burden of proof as to an assault with intent to murder charge. *Id.*, at 566, 570. Cooper subsequently rejected a less favorable offer. *Id.*, at 567. He was convicted in a jury trial and sentenced to 185 to 360 months in prison. *Ibid.*

In a post-conviction proceeding in the Michigan trial court, Cooper alleged that his trial counsel's ineffective assistance during plea bargaining had led him to reject the more favorable plea offer. *Ibid.* The trial court denied his claim, finding that "Mr. Cooper made his own choices." *Ibid.* The Michigan Court of Appeals rejected this and other claims and affirmed. The Michigan Supreme Court denied leave to appeal. *People* v. *Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005).

Cooper then filed a petition for writ of habeas corpus in federal court alleging the same claim. *Cooper* App. to Pet. for Cert. 32a. The District Court conditionally

granted the writ, finding that Cooper's trial counsel had been ineffective and that the state appellate court's decisions holding otherwise was an unreasonable application of federal precedent. *Id.*, at 41a-42a. The court ordered the state to reoffer Cooper its original plea deal of 51 to 85 months in prison or release him. *Id.*, at 42a.

The Sixth Circuit Court of Appeals affirmed. *Cooper* v. *Lafler*, 376 Fed. Appx., at 575. Applying the two-prong test of *Strickland* v. *Washington*, 466 U. S. 668 (1984), for ineffective assistance claims, the court held that trial counsel had rendered deficient performance, that Cooper had suffered prejudice, and that the state court's decision to the contrary was objectively unreasonable. *Cooper*, *supra*, at 571-572. With respect to the prejudice inquiry, the court found that "Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel," rejecting the argument that Cooper's receipt of a fair trial foreclosed a finding of prejudice. *Id.*, at 572-573. The court also affirmed the District Court's remedy. *Id.*, at 574.

Missouri v. *Frye*, No. 10-444

On August 14, 2007, the State of Missouri charged Petitioner Galin Frye with felony driving on a revoked license following three prior misdemeanor convictions. *Frye* v. *State*, 311 S. W. 3d 350, 351 (Mo. App. 2010). A few months later, the prosecutor sent to Frye's defense counsel a written plea offer that would have given Frye the option of pleading guilty to a misdemeanor charge. *Id.*, at 351-352. Though defense counsel received the offer, it was never communicated to Frye before the offer's date of expiration. *Id.*, at 352. Frye ultimately entered an "open" guilty plea to a felony charge of

driving while revoked and was sentenced to three years in prison. *Id.*, at 352-353.

In a state post-conviction proceeding, Frye claimed ineffective assistance for counsel's failure to communicate the prosecutor's offer. *Id.*, at 353. The trial court denied the motion. *Ibid.*

The Court of Appeals of Missouri reversed. *Id.*, at 361. Applying *Strickland* to Frye's claim, the court found counsel's failure to communicate constituted deficient performance. *Id.*, at 353-356. The court further found the error prejudicial on the grounds that "but for" counsel's error, the outcome of the proceeding would have been different because Frye would have pleaded guilty to a misdemeanor and received a more lenient sentence. See *id.*, at 357-360. Recognizing that it did not have the authority to order the state to reoffer the original plea offer, the court remanded the case to allow Frye to proceed to trial, plead guilty to the charged offense, or enter into a plea bargain should the prosecution decide to offer one. *Id.*, at 360-361. The Supreme Court of Missouri denied both parties' applications for transfer from the Missouri Court of Appeals. *Frye* v. *State*, 2010 Mo. LEXIS 415 (2010), *Frye* App. to Pet. for Cert. A1.

On January 7, 2011, this Court granted certiorari in both cases. The order further provided,

> "In addition to the Questions presented by the petitions the parties are directed to brief and argue the following question: 'What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?' "

SUMMARY OF ARGUMENT

A defense attorney is the opponent of the state in a criminal proceeding. A successful claim of ineffective assistance of counsel therefore punishes the state for an error over which it has no control. Such a drastic remedy should be limited to those claims that further the purpose of the right to effective assistance.

A criminal defendant is not entitled to a plea bargain. To afford the right to a more favorable outcome via the right to effective assistance of counsel is to grant defendants a windfall the Sixth Amendment does not require.

Strickland's prejudice inquiry was tethered to notions of reliability and fundamental fairness. A mechanical application of the "outcome determinative" test for prejudice is not appropriate where a defendant is convicted as a result of fair, reliable, and constitutionally adequate proceedings. A defense counsel error that simply prevented the defendant from receiving a more favorable outcome does not warrant reversal of the conviction so long as the end result is one in which we can place confidence.

The standard for reviewing prejudice in a plea bargain accepted by the defendant, which looks at whether the defendant would have insisted upon going to trial but for counsel's error, is limited to those cases in which there are no further adjudications of guilt. Where a plea bargain offer is rejected and further fact-finding or admissions of guilt occur, those later proceedings should be reviewed for reliability and fairness when evaluating an ineffective assistance claim.

ARGUMENT

I. Overturning a judgment based on the deficiency of the opposing party's attorney is a drastic remedy, to be granted only when *Strickland*'s high standard of prejudice is met.

A. A Unique Claim.

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure. For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, see *Connally* v. *General Constr. Co.*, 269 U. S. 385, 393 (1926), coercing a confession, see *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936), or withholding exculpatory evidence, see *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). In the context of ineffective assistance of counsel, however, "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland* v. *Washington*, 466 U. S. 668, 693 (1984).

While this Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment, see *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), this expansion of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. That purpose is to insure that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686. The integrity of the criminal justice system is threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

The remedy for a successful ineffective assistance claim is drastic, especially in light of the state's passive role. Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U. S., at 693-694. Such intrusions into this finality both "undermine[] confidence in the integrity of our procedures, and . . . inevitably delay[] and impair[] the orderly administration of justice." *Hill* v. *Lockhart*, 474 U. S. 52, 58 (1985) (internal quotation marks omitted).

Undoing guilty pleas also impairs the important interest in finality, as this Court reiterated this year. "Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside . . . ." *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 660-661 (2011). Prosecutors may be less inclined to enter into the "complex negotiations suffused with uncertainty," if pleas are too freely overturned. See *id.*, 131 S. Ct., at 741, 178 L. Ed. 2d., at 661. Defendants could see promised leniency slip away. See *id.*, 131 S. Ct., at 742, 178 L. Ed. 2d, at 661. This lack of finality produces "a result favorable to no one." See *ibid.* The unsettling response of setting pleas aside should be limited to those cases that absolutely require it.

B. State Action.

With the exception of the Thirteenth Amendment, the federal Constitution may be invoked only to prohibit state action. 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure, § 16.1, p. 994 (4th ed. 2007). In the typical case, this limitation is not a significant issue and the triggering state action is readily apparent. *Ibid.* In those cases

that do raise the issue, where a party attempts to attribute the actions of an individual to the state, caution is prudent.

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936-937 (1982) (emphasis added).

Thus state action will be found only where an individual's action can "be *fairly* attributable to the State." *Id.*, at 937 (emphasis added). In the standard criminal case, the involvement of police, prosecutors, judges, or legislatures easily satisfies this requirement. A claim of ineffective assistance, however, is different. The culprit in these claims—the incompetent attorney—is immune from state supervision, and can be more accurately characterized as an opponent of the state than one whose actions are attributable to it.

C. Defense Counsel and the State.

When a defendant is able to hire his own attorney, the State has no role in the defense beyond the minimal one of regulating admission to the bar. Denial of defendant's right to choose counsel is structural error, reversible *per se*. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006). When the trial court appoints counsel for an indigent defendant, the state has a role in the initial selection but virtually no control thereafter. Ineffective assistance claims are judged by

the same standard whether counsel is retained or appointed, see *Cuyler* v. *Sullivan*, 446 U. S. 335, 344-345 (1980), so the role of the state in appointing counsel cannot determine the standard to be applied in this case.

Defense counsel is the paid opponent of the state. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-1.2(b) (3d ed. 1993). In other words, defense counsel's duty is "to represent his client zealously within the bounds of the law." J. Burkoff, Criminal Defense Ethics § 5.1, p. 123 (2d ed. 2010) (quoting Model Code of Professional Responsibility, EC 7-19).

In *Polk County* v. *Dodson*, 454 U. S. 312 (1981), this duty of loyalty was central to the holding that a public defender's representation of a client did not fall within color of state law. That public defenders were employees of the state did not alter the traditional attorney-client relationship. " 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.' " *Id.*, at 318 (quoting ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980)).

Nor did the fact that defense counsel is considered an officer of the court change the analysis. Our adversarial system requires defense counsel to oppose the state.

> "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best

> serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.*, at 318-319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

State effort to control the public defender's representation conflicts with the accused's Sixth Amendment right to counsel. "Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.*, at 322.[2]

A successful ineffective assistance claim penalizes the state for an act over which it has no control. Not only is the state an innocent bystander throughout the process, but it is also difficult for the state to spot incompetent assistance until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." S. Giles, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1397 (1983). Imputing counsel's error to the state forces the state to stand as an insurer against a criminal defendant's risk of incompetent counsel, thereby spreading the risk from defendants to the people through reversed convictions.

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2. The precedential value of *Polk County* is not diminished by *Georgia* v. *McCollum*, 505 U. S. 42 (1992). That case deals with the unique circumstance of defense counsel using a state-granted power to discriminate against a third person in the selection of a governmental body. *Id.*, at 52.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While some attorney error may reasonably lead to a reversed conviction, the state cannot be required to assure an ideal trial. If counsel's error does not undermine confidence in the result, the error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

Ineffective assistance litigation is a heavy burden on the criminal justice system. In noncapital cases, half of all habeas petitions claim ineffective assistance. See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 28 (2007). Yet, of a sample of 2,384 cases, there was only *one* meritorious ineffective assistance claim. See *id.*, at 52. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes far less necessary and far more evil as the question moves farther away from reliability. The *Strickland* Court did not intend to "encourage the proliferation of ineffectiveness challenges," 466 U. S., at 690, but that is exactly what it did. To place some limits on this proliferation, *Strickland's* prejudice inquiry must be precisely and narrowly construed.

II. A plea bargain is a windfall to which a criminal defendant is not entitled.

Guilty pleas would be unnecessary "in an ideal world." See *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). Nevertheless, they have become "important components of this country's criminal justice system," *ibid.*, and should be encouraged to avoid the need "to multiply by many times the number of judges and court

facilities" that would be required if every case went to trial. See *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). Indeed, plea bargaining is now " 'the dominant force in criminal procedure.' " 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 21.1(b), p. 523 (3d ed. 2007) (quoting G. Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 230 (2003)).

Numerous explanations for the growth of plea bargaining have been offered, including more particularized case selection by law enforcement and prosecutors, the increasingly burdensome jury trial process, and sentencing law changes that threaten bigger and more certain penalties. See LaFave § 21.1(b), at 524-525. The most important justification, however, is dealing with overburdened court calendars. See *id.*, at 526.

The institution of plea bargaining and guilty pleas, therefore, is born from the interest in judicial efficiency, not any entitlement of a criminal defendant. Despite their advantages, plea bargains are not a required step in a criminal proceeding. This Court has made clear that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford* v. *Bursey*, 429 U. S. 545, 561 (1977).

A plea bargain that offers a less-than-required penalty, see, *e.g.*, *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 661 (2011), is a windfall to a defendant. A defendant who loses a windfall has not been deprived of anything to which he was entitled.

III. *Strickland's* "reasonable probability" test for prejudice is a specific test that does not apply in every situation.

A. Reliability.

Since its inception, the right to the effective assistance of counsel has been based on the unreliability of trial without counsel. The *Strickland* Court noted that, because the right to the effective assistance of counsel is born from the Sixth Amendment, "we must take its purpose—to ensure a fair trial—as the guide." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984); see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 368-369 (1993). "Thus, 'the right to effective assistance is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Fretwell*, *supra*, at 369 (quoting *United States* v. *Cronic*, 466 U. S. 648, 658 (1984)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra*, at 686.

Ensuring the reliability of results materialized in the form of *Strickland's* prejudice prong. "[T]he defendant must show . . . that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is *reliable*." *Id.*, at 687 (emphasis added). The claim before the Court in *Strickland* was a fairly typical one—counsel failed to investigate and present some mitigating evidence at trial. See *id.*, at 699-700. With this scenario in mind, the Court explained its "reliable result" principle by borrowing a standard from other rules dealing with omitted evidence. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694

(citing *United States* v. *Agurs*, 427 U. S. 97, 104 (1976) (information not disclosed by prosecutors); *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 872-874 (1982) (deported witness)).

The *Strickland* Court made clear, however, that this test was not an end in itself but only the means to implement the general principle of reliability.

> "Although these principles [on the probability of a different outcome] should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." 466 U. S., at 696.

The key focuses are reliability and confidence that the result is just. See *ibid.* In some contexts, the test of whether there is a "reasonable probability" the result "would have been different" is not the appropriate standard for implementing the principle underlying the right to effective representation.

> "It is true that while the *Strickland* test provides sufficient guidelines for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U. S., at 692. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different

outcome as legitimate 'prejudice.'" *Williams* v. *Taylor*, 529 U. S. 362, 391-392 (2000).

B. Exceptions to the Different Result Test.

The first exception is that in assessing the "likelihood of a result more favorable to the defendant . . . [a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland*, 466 U. S., at 695. The reviewing court must also "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like," or the "idiosyncrasies of the particular decisionmaker, such as the unusual propensities toward harshness or leniency." *Ibid.* Even if counsel could have employed a different strategy with these considerations in mind, and even if this could have indeed achieved a more favorable result for the defendant, these possibilities are simply "irrelevant to the prejudice inquiry." *Ibid.*

Jury nullification provides the starkest example. Defense counsel's failure to make a pitch for jury nullification, even if doing so would have gotten the defendant off altogether, does not reflect an *unreliable* result. The defendant certainly did not enjoy the most advantageous outcome, but that is far different from receiving an unfair proceeding.

Application of the "different result" standard to a result achieved by perjured testimony similarly would not further the "ultimate focus" on fairness and reliability. During his trial for fatally stabbing to death a man over a drug dispute, Emmanuel Whiteside sought to lie on the stand to corroborate a theory of self defense, but his attorney refused to let him. *Nix* v. *Whiteside*, 475 U. S. 157, 160-161 (1986). The Eighth Circuit deemed this ineffective assistance of counsel. *Id.*, at 163.

The *Nix* majority devotes most of the opinion to *Strickland's* deficient performance inquiry, and its discussion of the prejudice prong is consequently brief. Noting that "Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury," *id.*, at 175, the majority concludes, "Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*, at 175-176.

Justice Blackmun's concurring opinion expands on this point. He would have denied the claim solely on the prejudice ground, effectively holding that Whiteside had no claim, even if his lawyer's performance did fall below the Sixth Amendment thresholds. To reach this result, the concurrence returns to the underlying principle of the *Strickland* prejudice component. "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.*, at 184 (quoting *Strickland*, 466 U. S., at 687). The appropriate question, therefore, was whether the Court's "confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony," to which an answer in the positive is "simply untenable." *Id.*, at 185. This is true, Justice Blackmun makes quite clear, *even if* the false evidence might have changed the result. *Id.*, at 186. It is therefore not a universal rule that any alleged error by defense counsel throughout criminal proceedings which may have had a reasonable probability of changing the result satisfies *Strickland's* prejudice prong. The Court unanimously rejected Whiteside's prejudice claim even assuming the result would have been different. *Id.*, at 175-176 (majority); *id.*, at 186-187 (concurrence).

In *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), Morrison's trial counsel moved for the exclusion of evidence on the grounds that it had been illegally seized, but he missed the deadline, and the motion was denied as untimely. *Id.*, at 368-369. When the federal courts granted habeas relief for ineffective assistance of counsel, the state petitioned for certiorari, asking that *Stone* v. *Powell*, 428 U. S. 465 (1976), which excluded Fourth Amendment exclusionary rule claims from reconsideration on federal habeas corpus, be extended to ineffective assistance claims where the underlying error is based on the exclusionary rule. See *Kimmelman*, 477 U. S., at 368. The Court unanimously rejected this request. *Id.*, at 382-383 (majority); *id.*, at 391 (Powell, J., concurring in the judgment).

The discussion of the "reliability" component of prejudice in *Nix*, however raises another question that could have been argued in *Kimmelman* but was not. "The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*." *Id.*, at 391 (Powell, J., concurring in the judgment). Justice Powell pointed to *Strickland's* "ultimate focus of inquiry" on fundamental fairness and reliability, and reasoned that a conviction obtained by illegally-seized evidence does not amount to an "unjust or unfair verdict." *Id.*, at 395-396. On the contrary, such a verdict is perhaps *more just* than a decision reached by a partially uninformed jury, from which the exclusionary rule shielded relevant and incriminating evidence. See *id.*, at 396. The only "harm" suffered by a defendant under these circumstances is the "absence of a windfall." *Ibid.* To say that the Sixth Amendment right to effective assistance of counsel protects criminal defendants from this harm "would shake that right loose from its constitutional moorings." *Id.*, at 397. *Kimmelman* did not resolve the *Strickland* prejudice argument, however, because the

State did not raise it. See *ibid.* The issue "remains an open one," *id.*, at 398, to this day.

In *Lockhart* v. *Fretwell*, *supra*, the Court identified another variation to be excluded from the "different result" standard—defense counsel's failure to make an objection that, though it might have been accepted at the time of trial, is known to be meritless at the time the ineffective assistance claim is decided. See 506 U. S., at 374 (O'Connor, J., concurring). In that case, Fretwell's attorney failed to object to the Arkansas jury's consideration of a certain aggravating factor during the sentencing phase. *Id.*, at 366-367. Fretwell argued that, had counsel made the objection, it would have been sustained under then-existing Eighth Circuit precedent.[3] See *id.*, at 367. By the time Fretwell's ineffective assistance claim reached the Eighth Circuit, however, that court had overruled the precedent, recognizing that counsel's omitted objection would have been meritless. See *id.*, at 368.

Returning to *Strickland's* underlying notions of fairness and reliability, the Court determined the "different result" standard, without more, was inappropriate to determine whether prejudice was established. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.*, at 369; see also *id.*, at 372; *Glover* v. *United States*, 531 U. S. 198, 202 (2001) ("*Lockhart* holds that in some circumstances a mere difference in outcome will not suffice to establish prejudice). Be-

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3. The Arkansas trial court was not bound to follow Eighth Circuit precedent, however. See *id.*, at 375-376 (Thomas, J., concurring); *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997) (citing *Fretwell* concurrence and referring to contrary Ninth Circuit passage as "remarkable").

cause the alleged error in this case merely "deprived [Fretwell] of the chance to have the state court make an error in his favor," 506 U. S., at 371 (quoting Brief for United States as *Amicus Curiae* 10), as a matter of law he suffered no prejudice. See *id.*, at 372.

C. *Right to Effective Assistance Versus Right to Reversal.*

There is no question that a defendant is entitled to the "guiding hand of counsel at every step in the proceedings . . . ." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). *Strickland*'s prejudice component addresses the question of whether an error is grounds for reversal. The prejudice discussions in *Nix*, *Kimmelman*, and *Strickland* itself demonstrate that an unprofessional error, even one that satisfies the "different result" standard, does not always warrant reversal.

In *Strickland*, there was no dispute that the omitted evidence, although weak, was relevant and admissible. See 466 U. S., at 676-677. In these circumstances, the only issue regarding the reliability of the result was whether admission of that evidence would have made a difference. See *id.*, at 699-700.

In *Kimmelman*, the admissibility of the evidence was hotly disputed, though its veracity and relevance were not. As a result, *Kimmelman* added to *Strickland*'s "reasonable probability" requirement a condition that the disputed evidence actually be inadmissible. 477 U. S., at 390-391. Justice Powell believed that the entire category of Fourth Amendment exclusion claims did not jeopardize the fairness and reliability of the results, because the defendant was not denied "a fair and reliable adjudication of his guilt." *Id.*, at 396. This issue remains unresolved, although Justice Powell's discussion has been favorably cited by the Court twice

since then. See *Fretwell*, 506 U. S., at 372; *Williams*, 529 U. S., at 393, n. 17 (quoting *Fretwell*).

The evidence in *Nix* lies at the opposite end of the spectrum from the evidence in *Strickland*. Lying under oath is not merely an error, it is a felony. No one could reasonably contend that a trial where a defendant is restrained from lying is thereby rendered less reliable or less likely to produce a just result. See *Nix*, 475 U. S., at 185 (Blackmun, J., concurring in the result). Where introducing evidence would be wrong, omitting that evidence cannot be prejudicial, regardless of whether it might have changed the result.

The question in these cases is not whether the defendant was deprived of a "sporting chance." See *Brady* v. *Maryland*, 373 U. S. 83, 90 (1963). It is only whether there is reason to lack confidence in the result. See *Strickland*, 466 U. S., at 691-692. The scope of reversible error is therefore narrower than the scope of the defendant's right to effective assistance. Even where an effective lawyer could have "gotten him off" by causing the system to malfunction in some way, the defendant is nevertheless not entitled to a reversal.

Where a defendant voluntarily, intelligently, and knowingly, see *Brady* v. *United States*, 397 U. S. 742, 748 (1970), enters into a guilty plea, or where a criminal defendant receives a fair adjudication of guilt during a criminal trial, there is no "breakdown in the adversarial process that our system counts on to produce just results." See *Strickland*, 466 U. S., at 696. The reliability of the result is not shaken by a claim that a more effective attorney could have achieved an outcome more favorable to the defendant. Such a strict outcome-determinative inquiry would ignore the principle underlying *Strickland*—"the ultimate focus of inquiry . . . on the fundamental fairness of the proceeding whose result is being challenged." See *ibid*. To

overturn a reliable result by rigid adherence to *Strickland*'s "different result" standard under these circumstances is, in effect, granting the defendant a "windfall." See *Fretwell*, 506 U. S., at 366. The Sixth Amendment does not require such a result.

IV. Deficient performance during plea bargaining that renders a possibly unreliable result is distinguishable from the circumstances presented here.

Adhering to *Strickland*'s underlying notions of fundamental fairness and reliability will not always foreclose a defendant from successfully claiming ineffective assistance during the plea bargaining stage. The prejudice inquiry may still be satisfied, and relief warranted, where counsel's deficiency produces a result in which we cannot place confidence.

In *Hill* v. *Lockhart*, 474 U. S. 52 (1985), Hill pleaded guilty to first-degree murder. *Id.*, at 53. He sought federal habeas relief years later, claiming ineffective assistance for counsel's failure to inform him correctly of his parole eligibility prior to his guilty plea. *Id.*, at 54-55. Applying the regular *Strickland* test to Hill's claim, the Court explained that the prejudice inquiry in the context of guilty pleas is whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*, at 59. Because Hill had not shown that his mistaken belief about his parole eligibility date was a significant reason for foregoing trial, he failed to satisfy the prejudice prong. *Id.*, at 60.

In *Padilla* v. *Kentucky*, 559 U. S. __, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010), counsel's failure to advise the defendant of the deportation consequences of a guilty plea was deemed deficient performance. The

Court remanded the case for an evaluation of the prejudice inquiry. See *id.*, 130 S. Ct., at 1483-1484, 176 L. Ed. 2d, at 296. Although *Padilla* did not spell out the nature of that inquiry, the clear implication is that the *Hill* standard applies. See *id.*, 130 S. Ct., at 1485, 176 L. Ed. 2d, at 297.

Under circumstances such as those just described, reliability is lacking where a defendant, reasonably relying on counsel's error, pleads guilty and foregoes his or her Sixth Amendment right to a trial. A showing that the defendant had a reasonable chance of prevailing at trial cannot be required because that determination could not be made without trying the underlying case within the habeas proceeding. We cannot have confidence in the result when counsel's deficient performance is potentially the primary reason for the result, as opposed to a jury verdict following a full and fair trial or a defendant's fully-informed decision to plead guilty. Such a result lacks the "fundamental fairness" emphasized in *Strickland*.

But such reasoning is inapposite in the present cases, as Respondents did not waive their right to trial in reliance on counsel error. Their convictions were obtained as a result of fair, reliable, and constitutionally adequate criminal proceedings, and any alleged error in prior negotiations does not tarnish that result. Under these circumstances, counsels' alleged deficient performance had no impact on the fairness of the proceedings. The fundamental fairness and reliability of the result remain intact, and that is all the Sixth Amendment requires. See *Strickland*, 466 U. S., at 696.

Smith v. *Robbins*, 528 U. S. 259 (2000), and *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), provide an informative contrast in this regard. Robbins had an appeal and was represented by appellate counsel who found no issues to brief. *Robbins*, *supra*, at 267. To establish

prejudice, Robbins had to show a reasonable probability that he would have prevailed on appeal had a brief been field. See *id.*, at 285. Flores-Ortega, in contrast, had no appeal because trial counsel did not file the requisite notice. See *Flores-Ortega*, *supra*, at 474. Following *Hill*, the Court decided that "prejudice" meant only "a reasonable probability that . . . he would have appealed," *id.*, at 484, not that he would have prevailed on appeal. See *id.*, at 486. The difference in the two cases is between "a judicial proceeding of disputed reliability [and] the forfeiture of a proceeding itself." *Id.*, at 483.

The contrast between the present cases and *Hill* is even sharper than the contrast between *Robbins* and *Flores-Ortega*. In these cases not only have defendants not "forfeit[ed] a judicial proceeding to which [they were] otherwise entitled," *id.*, at 485, they do not, at this point, even challenge the reliability of the proceedings that did result in their convictions.

* * *

The question added by the Court in both of these cases is, "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?" The answer, *amici* submit, is none. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Fretwell*, 506 U. S., at 366.

CONCLUSION

The decisions of the United States Court of Appeals for the Sixth Circuit and the Court of Appeals of Missouri should be reversed.

April, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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Nos. 10-209 & 10-444

IN THE

Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

MISSOURI,
Petitioner,
v.
GALIN E. FRYE,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Supreme Court of Missouri

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the Connecticut Criminal Defense Lawyers Association ("CCDLA"), and the American Civil Liberties Union Foundation ("ACLU") as *amici curiae* in support of respondents in both *Lafler v. Cooper*, No. 10-209, and *Missouri v. Frye*, No. 10-444.[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

CCDLA, an affiliate of NACDL, is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut.

The ACLU is a nationwide nonprofit, nonpartisan organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the Constitution.

SUMMARY OF ARGUMENT

The decisions of the lower courts in both *Lafler* and *Frye* are correct. The Sixth Amendment is violated when a defendant forgoes a plea due to ineffective assistance of counsel and is then convicted and receives a more severe sentence than would have resulted from the plea. Neither a subsequent trial nor a less favorable plea can cure that violation or undo the prejudice suffered from the counsel's deficient performance. Instead, courts must fashion a remedy that places the parties as close as possible to the position they were in before the ineffective assistance occurred.

Amici emphasize three points. First, plea bargaining occupies a central role in the criminal justice system, with the overwhelming majority of criminal cases in state and federal court resulting in guilty pleas. Given the predominance of plea bargaining and this Court's recognition that it is a "critical stage" of the proceedings, the Sixth Amendment requires that defendants receive effective assistance of counsel when considering whether to accept a plea, and it requires a remedy when a defendant can es-

tablish that he received ineffective assistance under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Next, when faced with a Sixth Amendment violation in the context of a forgone plea, courts must fashion a remedy that "neutralize[s] the taint [and] tailor[s] relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). The various approaches employed by the lower courts demonstrate that it is possible to craft a remedy that addresses the prejudice caused by the constitutional violation—i.e., a harsher conviction and sentence than the defendant would have received absent the violation—and puts the parties as close as possible to the position they occupied before the ineffective assistance was rendered.

Finally, recognizing a remedy in the forgone-plea context will not encourage defense counsel to engage in "sandbagging" by failing to convey (or convey adequately) plea offers, nor will it "open the floodgates" of habeas litigation. Defense attorneys, just like prosecutors, are members of the bar and officers of the court, and it is both preposterous and insulting to suggest that they would deliberately engage in ineffective assistance. Nor is there any reason to believe that recognizing a remedy in this context will result in a cavalcade of frivolous habeas litigation. Indeed, the state and federal courts have been recognizing and remedying these claims for three decades without being overwhelmed by them.

ARGUMENT

I. THE SIXTH AMENDMENT GUARANTEES EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS

A. Plea Negotiations Are A Critical Stage Of The Criminal Trial Process

Plea negotiations are "a defining, if not the defining, feature" of the contemporary American criminal justice system. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1064 (2006). In the most recent years for which data is available, approximately 97% of federal and 94% of state convictions were the result of guilty pleas. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, tbl. 5.22.2009;[2] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 – Statistical Tables* 1 (Dec. 2009).[3] This Court has repeatedly noted the predominance of plea bargaining in criminal adjudications, recently observing that "[p]leas account for nearly 95% of all criminal convictions." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

In a system where the overwhelming majority of criminal cases are resolved through pleas, the decision to plead guilty is "ordinarily the most important

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[2] *Available at* http://www.albany.edu/sourcebook/pdf/t522009.pdf.

[3] *Available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

single decision in any criminal case." Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 201 (4th ed. 1984); *see also Brady v. United States*, 397 U.S. 742, 748 (1970) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."). It follows from this that "[t]he most important service that criminal defense lawyers perform . . . is advising [the defendant] whether to plead guilty and on what terms." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 698 (2002).

B. A Sixth Amendment Violation In Plea Bargaining Necessarily Entails Prejudice To The Defendant

Given the centrality of plea negotiations in the criminal justice system, it is no surprise that this Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (noting that the Court has "recognize[d] the importance of counsel during plea negotiations"). The Sixth Amendment guarantee of effective assistance during plea negotiations stems from the longstanding recognition that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

In order to establish a claim of ineffective assistance of counsel during a "critical stage" of a criminal proceeding, the defendant must show that his

counsel's performance "fell below an objective standard of reasonableness," and that he suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687-88, 694. To establish prejudice, the defendant need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court confirmed that the two-part *Strickland* test was "applicable to ineffective-assistance claims arising out of the plea process." *Id.* at 57. The Court explained that in determining whether the prejudice prong is satisfied, the focus should be "on whether counsel's constitutionally ineffective performance affected the *outcome of the plea process*." *Id.* at 59 (emphasis added).

Where, as in respondents' cases, counsel's deficient performance causes a criminal defendant to reject the prosecution's offer of plea that he would have otherwise accepted, the ineffective performance necessarily "affect[s] the outcome of the plea process." *Hill*, 474 U.S. at 59. And where the defendant can show, as respondents have done, that "he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence," the prejudice prong of *Strickland* is satisfied. *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001); *see also Carmichael v. People*, 206 P.3d 800, 807 (Colo. 2009) (holding that the test for prejudice is "a reasonable probability that, but for counsel's errors, [the defendant] would have accepted the plea offer rather than going to trial"). In other words, respondents have shown that, as a result of the defi-

cient performance, they were denied the opportunity to accept a plea that would have resulted in convictions for lesser offenses, and much shorter sentences, than they received as a result of the trial and/or subsequent plea.

This Court has already held that "any amount of actual jail time has Sixth Amendment significance" when evaluating *Strickland*'s prejudice prong. *Glover v. United States*, 531 U.S. 198, 203 (2001). In this way, the result of the proceedings against both respondents was irrevocably tainted by their counsels' constitutionally deficient performance at the plea stage. Simply put, they received much more jail time than they would have but for the constitutional violation that occurred in the plea process. That result is incompatible with this Court's Sixth Amendment jurisprudence.

Petitioners and the United States suggest that because criminal defendants do not have a right to a plea bargain, a defendant who forgoes a plea due to ineffective assistance has not been deprived of any "'substantive or procedural right to which the law entitles him.'" *Lafler* Pet. Br. at 21 (quoting *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000)); *see also Lafler* U.S. Br. at 18-19; *Frye* U.S. Br. at 18-19. That argument is incorrect. The question is not whether a criminal defendant has a right to engage in plea negotiations or ask for a plea bargain. The question is whether, when the prosecution has decided to offer a plea, the defendant has a right to have his counsel inform him of that offer and provide reasonable information about the consequences of accepting or rejecting it. That right has been clearly and consistently recognized by this Court. *See*

Padilla, 130 S. Ct. at 1480-81 ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel."); *Libretti v. United States*, 516 U.S. 29, 50 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *Strickland*, 466 U.S. at 688 (explaining counsel's "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"). Where defense counsel is derelict in those duties, and the defendant forgoes a favorable plea as a result, the defendant has established ineffective assistance of counsel under *Strickland*'s two-prong test.

Petitioners and the United States also suggest that a defendant who forgoes a plea as a result of deficient counsel cannot establish prejudice under *Strickland* because he cannot show that the prosecutor would not have withdrawn the offer or that the court would have accepted the plea. *See, e.g.*, *Lafler* U.S. Br. at 19-21. But under *Strickland*, a defendant is only required to show a "reasonable probability" that counsel's deficient performance affected the outcome of the proceeding. 466 U.S. at 694. Where a prosecutor has offered a plea agreement and there is no indication in the record that it would have been withdrawn or that the court would not have accepted it, there is at least a "reasonable probability" that

the defendant would have successfully pled guilty in accordance with the plea offer.

II. THE LOWER COURTS CAN AND MUST FASHION APPROPRIATE RELIEF TO REMEDY INEFFECTIVE ASSISTANCE AT THE PLEA STAGE

"Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. The court must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *Id.* at 365.

As discussed *supra* in Part I.B, the "injury suffered" in a forgone plea is a conviction and/or sentence more severe than the defendant would have received had the defendant been appropriately counseled and accepted the plea. That outcome is not a "just result[]," *Strickland*, 466 U.S. at 685, because it would not exist absent counsel's "constitutional deficiency," *Padilla*, 130 S. Ct. at 1482. In order to "neutralize th[at] taint," courts must fashion a remedy that places the defendant as close as possible to the position he would have occupied absent the ineffective assistance. *See Morrison*, 449 U.S. at 365.

The court reviewing the ineffective-assistance claim is in the best position to consider the particular circumstances of the case and fashion a remedy that "neutralize[s] the taint" without unduly infringing on competing interests. *Morrison*, 449 U.S. at 365. Various considerations—including the procedural posture of the case, the offense of conviction compared to the offense at issue in the plea offer,

and the factual circumstances surrounding the plea offer—will factor into the calculus of an appropriate remedy. In some cases, the most efficient course to "neutralize the taint" could be to fashion a remedy that approximates the original plea offer, such as by reducing the sentence or conditionally vacating the conviction unless the prosecutor reoffers the original plea or reopens plea negotiations. In other cases, the appropriate remedy might be to vacate the conviction and remand for a new trial (with the possibility of new plea negotiations). Each of these is a constitutionally permissible remedy, and the choice between them should be within the discretion of the court, guided by the parties' recommendations as to an appropriate remedy on the facts of the case.

A. Trial Courts Are Best Situated To Select A Remedy Appropriate To The Circumstances

This Court has previously recognized that the appropriate remedy for malfeasance at the plea stage will depend on the particular circumstances of the case, and that lower courts are best suited to make this determination. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971). In *Santobello*, the Court considered the appropriate remedy to be imposed after the prosecution breached a plea agreement with the defendant. Rather than selecting a particular remedy, the Court remanded the case, concluding that "[t]he ultimate relief to which petitioner is entitled" should be left "to the discretion of the state court, which is in a better position to decide whether the circumstances" of the case necessitated specific performance of the plea agreement or the opportunity for the defendant to withdraw his plea

entirely. *Id.* at 263.

Just as in *Santobello*, the court reviewing the ineffective-assistance claim is in the best position to craft a remedy that addresses the "injury suffered from the constitutional violation" without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 364. Indeed, the variety of approaches developed by state and federal courts confirms that courts are capable of fashioning appropriate remedies for ineffective assistance in the forgone-plea context.

For example, in a case where the offense of conviction is the same as the offense at issue in the forgone plea and the difference is the sentence imposed, the most efficient remedy may be to reduce the sentence to what it would have been under the plea agreement rather than vacate the conviction and remand for further proceedings. *See Becton v. Hun*, 205 W. Va. 139, 145 (W. Va. 1999) ("Because the Appellant's trial outcome and plea offer both resulted in a conviction of one count of aggravated robbery, we conclude that specific performance of the sentencing portion of the plea agreement proposal wherein the State would recommend a ten-year sentence is the appropriate remedy in this case."); *see also Jiminez v. State*, 144 P.3d 903, 907 (Okla. Crim. App. 2006) (same).

In other cases, the court could consider vacating the conviction and requiring reinstatement of the original plea agreement, *see, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994), or vacating and remanding for plea negotiations with a presumption of prosecutorial vindictiveness for any

plea offer less favorable than the original, *see, e.g.*, *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001). In those situations, the prosecutor is free to "seek to demonstrate that intervening circumstances have so changed the factual premises of its original offer that, with just cause, it would have modified or withdrawn its offer prior to its expiration date." *Blaylock*, 20 F.3d at 1468-69.[4]

Finally, a court could vacate the conviction and remand for a new trial, leaving available the possibility that parties will simply re-negotiate a plea, whether or not precisely the same as before. *See, e.g.*, *Riggs v. Fairman*, 399 F.3d 1179, 1184 (9th Cir. 2005); *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998). Vacatur at least "places the defendant at a stage in the proceedings prior to the point at which he or she failed to receive the effective assistance of counsel." *State v. Lentowski*, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997). And vacatur is the very minimum necessary to remedy the core Sixth Amendment violation, which, as discussed, is counsel's deficient plea performance resulting in a conviction and/or sentence more severe than would have occurred in the absence of the deficient performance. Vacatur of the harsher conviction and/or longer sentence resulting from the violation thus should follow as a matter of course once the violation itself is es-

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[4] The possibility of a post-acceptance withdrawal of the plea does not negate a finding of prejudice, which requires a showing only of a "reasonable probability" that but for defense counsel's ineffective assistance, the defendant would have accepted the plea. *See, e.g.*, *Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). It may nevertheless be a consideration in determining what the appropriate remedy should be on the facts of the case. *Id.*

tablished, unless one of the other options better fits the circumstances of the case.

B. Petitioners' And The United States' Counter-Arguments Are Unavailing

Petitioners and the United States contend that because no one remedy is necessarily appropriate for every case, the Sixth Amendment violation should simply go unremedied in all cases. *See Lafler* Pet. Br. at 22-26; *Lafler* U.S. Br. at 24-32; *Frye* U.S. Br. at 25-32. But this Court recognized in *Santobello* that there can be a range of constitutionally appropriate remedies for a particular violation, and it concluded that lower courts are competent to select a remedy that best suits the circumstances of the case. *See* 404 U.S. at 262-63; *id.* at 268-69 (Marshall, J., concurring in part and dissenting in part); *see also Mabry v. Johnson*, 467 U.S. 504, 511 n.11 (1984).

The same is true here. Depending on the unique circumstances of the case, the appropriately tailored remedy might be specific performance of the plea agreement, or it might be vacatur of the conviction and remand for a new trial. The United States' objections to these remedies merely confirms that no one remedy will be appropriate in every case, and thus courts should have discretion to fashion a remedy that "neutralize[s] the taint" of the constitutional violation without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 365.

1. The United States contends that a specific performance remedy is inappropriate because it gives the defendant the benefits of the original plea offer, without recognizing the risk that the prosecution could have revoked it or the trial court could have rejected it before it came to fruition. *See Lafler*

U.S. Br. at 28; *Frye* U.S. Br. at 29. But, as explained *supra*, courts can and do consider the possibility of post-acceptance withdrawal or trial-court rejection of the plea offer in determining whether a specific performance remedy is appropriate on the facts of the case. *See Blaylock*, 20 F.3d at 1468-69. Where the court concludes that the prosecutor would have withdrawn the plea or the trial court would have rejected it, then the court will decline to award specific performance. *See Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). Indeed, if there is a sufficient evidentiary basis for concluding that the plea would not have been consummated for these reasons—more than just rank speculation of the "anything could happen" variety—there would not even be the underlying prejudice necessary to establish the violation. The question of remedy would be irrelevant.

2. The United States also argues that specific performance is inappropriate because the "mutuality of advantage" underpinning the original plea offer—that is, the incentives that led the prosecution to offer the plea in the first instance, such as the opportunity to secure the defendant's cooperation against a codefendant or the ability to avoid a trial—may no longer be present at the time the ineffective-assistance claim is adjudicated, and thus specific performance of the plea could result in a windfall for the defendant. *Lafler* U.S. Br. at 29. But again the United States fails to recognize that courts do consider changed circumstances when evaluating whether to fashion a specific performance remedy. *See United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992) (in fashioning appropriate remedy, court could consider "any legitimate (nonvindictive) reasons why

the prosecution may no longer favor the plea agreement"). To be sure, changed circumstances might countenance against reinstatement of a plea offer in a particular case, but it does not follow from this that "the relief of 'specific performance' of a plea bargain is *never* appropriate." *Id.*

3. The United States' argument that specific performance remedies violate separation-of-powers principles also misses the mark. *See Lafler* U.S. Br. at 30-31 & n.16; *Frye* U.S. Br. at 30-31 & n.9; *see also Lafler* Pet. Br. at 24. First, many ineffective-assistance plea cases arise on federal habeas review of a state conviction, and, as the United States concedes, the federal habeas court is not bound by state separation-of-powers principles. Next, to the extent petitioners and their *amici* are worried about federal courts encroaching on the authority of state prosecutors, the proper course is for the federal court to grant a conditional writ of habeas, which provides the State with the option of adopting the habeas court's proposed remedy or accepting the defendant's release. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief."). With a conditional writ, "the state is given various alternatives which include release of petitioner as one of the alternatives, or which provides for release of petitioner if the alternatives are not met." 39A C.J.S. *Habeas Corpus* § 373; *see, e.g.*, *Lafler* Pet. App. 42a (granting conditional writ for defendant's release unless the State reoffers the original plea); *Riggs*, 178 F. Supp. 2d at 1142 (granting conditional writ unless prisoner "brought to retrial [including new plea bargaining

phase] within ninety (90) days"). Conditional writs provide the State the option of curing the constitutional defect, but do not require it, which alleviates concerns about federal interference with state proceedings. *See Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003).

Additionally, even assuming that imposition of a specific performance remedy in a particular case might raise separation-of-powers concerns, that is a consideration for the reviewing court to take into account in fashioning a remedy that does not "unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. But again, that specific performance might not be the appropriate remedy in a particular case does not mean that is inappropriate in *every* case. *See Day*, 969 F.2d at 47.

4. The United States' concerns about the new-trial remedy fare no better. The United States contends that because respondents sought to plead guilty, "any remedy that upsets the finding of [their] guilt has nothing to do with [their] constitutional claim." *Lafler* U.S. Br. at 25. That argument misunderstands the nature of the constitutional violation. Where a trial or subsequent plea *would not have happened but for a constitutional violation*, the harsher conviction and sentence that results cannot be a constitutionally valid outcome. *Strickland*, 466 U.S. at 685. A defendant who receives vacatur of his conviction certainly is not put "in a better position than if he had never received the deficient advice." *Lafler* U.S. Br. at 25 (emphasis omitted). Rather, he is placed in the same position he occupied before his lawyer's unconstitutionally deficient performance.

5. The United States also objects that vacating

the conviction to allow the parties to resume plea negotiations is unwarranted because the parties' incentives will have changed over time. *See Lafler* U.S. Br. at 27. Perhaps so. But it is hardly clear that the incentives will change in only one direction. A new trial will create a new set of risks and incentives for *both parties* to balance, which may very well lead to new plea negotiations and a successful plea. The passage of time might diminish witness memories or availability to the benefit of some defendants in some cases, but, where the case has been to trial, both sides will also know that at least one jury found that the facts established guilt beyond a reasonable doubt. And the defendant may be concerned that a new trial will result in an even longer sentence. In short, the incentives to plead, if perhaps somewhat different, will unquestionably continue to drive the parties toward another negotiated resolution.

III. RECOGNIZING A REMEDY FOR INEFFECTIVE ASSISTANCE IN THE CONTEXT OF A FORGONE PLEA WILL NOT IMPAIR THE ADMINISTRATION OF JUSTICE

Petitioners and their *amici* raise two related concerns about the administrative implications of recognizing a remedy for ineffective assistance in the context of a forgone plea. First, they assert that it will "perversely encourage[] sandbagging." *Lafler* U.S. Br. at 29; *see also Frye* Pet. Br. at 36-37. Second, they allege that recognizing the claim would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *accord* CJLF Br. at 12. Both concerns are unfounded.

A. Defendants And Defense Lawyers Will Have No Incentive To Sandbag

Missouri and the United States contend that a defendant with a colorable claim that his lawyer mishandled his plea offer might "take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Lafler* U.S. Br. at 29 (quoting *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting)). Missouri goes further, warning darkly that "shrewd defense attorney[s]" will willfully violate their ethical duties and "strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." *Frye* Pet. Br. at 36. Those concerns are baseless.

1. Defendants who reject pleas because of ineffective assistance go to trial not to game the criminal justice system, but because they have no choice. The definition of prejudice courts have applied in the forgone-plea context confirms this point. To show prejudice, the defendant must "show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence." *Wanatee*, 259 F.3d at 703-04. A defendant who rejected a plea offer because he could bring an ineffective-assistance challenge if trial turned out poorly could not meet this standard. The defendant's strategic choice, not "counsel's advice," would be the reason for denying the plea. *Id.*

But perhaps the concern is that, in any case where there was plea bargaining, a defendant might assert that his lawyer failed to inform him of a fa-

vorable plea offer, regardless of what actually happened. Such claims, however, have little chance of success. Defendants alleging ineffective assistance bear the burden of proving both deficient performance and prejudice. *See Strickland*, 466 U.S. at 690, 694. Absent concrete evidence, a claim that counsel failed to inform a defendant of a plea offer is a swearing contest between the defendant and his attorney. Petitioners' own *amici* starkly demonstrate how difficult it is in practice for defendants to meet their burden under *Strickland*. *See* CJLF Br. at 12 ("of a sample of 2,384 cases, there was only one meritorious ineffective assistance claim") (citing N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 52 (2007)). It is absurd to think that defendants will commonly prevail on these claims without solid evidence of their counsel's deficient plea performance.

2. Missouri's further concern that defense lawyers will intentionally neglect to inform their clients of plea offers to create "a sort of insurance policy," *Frye* Pet. Br. at 36, is not only unfounded, but outrageous. Defense lawyers are no less devoted than prosecutors to "serv[ing] their clients and the judicial system with integrity." *Day*, 969 F.2d at 46, n.9. Pocketing a plea offer runs afoul of the American Bar Association's Model Rules of Professional Conduct, which provide: "[a] lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required." Model Rules of Prof'l Conduct R. 1.4(a)(1) (2007). Moreover, "deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. . . . [B]ecause incompetent lawyers risk disciplinary action, malpractice suits,

and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate." *Day*, 969 F.2d at 46, n.9; *see also In re De Rycke*, 707 N.W.2d 370 (Minn. 2006) (holding that disbarment was appropriate remedy for attorney who, among other ethical violations, failed to inform clients of plea offers); *Lawyer Disciplinary Bd. v. Turgeon*, 557 S.E.2d 235 (W. Va. 2000) (imposing two-year suspension for failure to inform client of plea offer).

3. While each of these reasons belies the claim that defense counsel will deliberately engage in ineffective assistance by failing to convey a plea offer, it is also worth noting that the prosecutor himself can guard against this potential problem by placing any plea offer on the record in the case. Courts in Arizona, for example, will often hold what is known as a "*Donald* hearing" before trial to ensure that the defendant understands the State's plea offer and the consequences of trial and conviction. *See State v. Donald*, 10 P.3d 1193 (Ariz. Ct. App. 2000); *see, e.g.*, *State v. Ware*, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011) (explaining pre-trial *Donald* hearing). By placing a plea offer on the record, all parties can have a sound "insurance policy" against a post-trial claim that the offer was not properly conveyed to the defendant.

B. There Will Be No Flood Of Post-Conviction Litigation

Petitioners and their *amici* also contend that recognizing ineffective assistance in the context of a forgone plea would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *see also* CJLF Br. at 12. That, too, is incorrect.

1. This Court has considered—and rejected—this very argument in its two prior cases addressing ineffective assistance during plea negotiations. *See Padilla*, 130 S. Ct. at 1485; *Hill*, 474 U.S. at 58. As this Court explained, "[s]urmounting *Strickland*'s high bar is never an easy task," and "[t]here is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *Padilla*, 130 S. Ct. at 1485.

The Court's recognition last Term in *Padilla* that lower courts are well-equipped to consider *Strickland* claims has even more force in the context of ineffective-assistance claims based on forgone pleas because state and federal courts have been entertaining these claims for three decades. *See, e.g.*, *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982). Continuing to acknowledge such claims is unlikely to have a significant impact on the overall amount of post-conviction litigation in the courts.

Indeed, the recent experience in Connecticut belies any suggestion that recognizing ineffective assistance in the forgone-plea context will result in a flood of habeas litigation. In 2004, the Connecticut Appellate Court held that a defendant can establish ineffective assistance of counsel where defense counsel fails to meaningfully explain the State's plea offer, the defendant rejects the offer, and he is subsequently convicted and receives a higher sentence. *See Sanders v. Comm'r of Correction*, 851 A.2d 313 (2004). The State had offered the defendant a plea

in which he would serve a 12-year sentence for the offense to run concurrently with a nine-year sentence that had already been imposed in a separate case, but defense counsel failed to meaningfully explain the plea and the consequences of going to trial. The defendant proceeded to trial, where he was convicted and sentenced to a 25-year sentence to run consecutively to the sentence in his other case. *Id.* at 315-16. On a petition for habeas, the lower court concluded that the defendant had established ineffective assistance under *Strickland* and ordered that the defendant's sentence be reduced to reflect the plea offer pending the defendant's entry of guilty pleas in accordance with the terms of the offer. *Id.* at 316. The Connecticut Appellate Court affirmed. *Id.* at 320.

In the years since *Sanders*, the Connecticut courts have not been inundated with claims of ineffective assistance in the context of forgone pleas. *Sanders* claims have been raised in approximately twenty cases, of which Connecticut courts granted habeas relief only three times. *See H.P.T. v. Comm'r of Correction*, 14 A.3d 1047 (Conn. App. Ct. 2011); *Ebron v. Comm'r of Correction*, 992 A.2d 1200 (Conn. App. Ct.), *cert. granted on other grounds*, 995 A.2d 954 (2010); *Valle v. Warden*, 2008 WL 2313664, at *13 (Conn. Super. Ct. May 15, 2008).

2. But even if recognizing a remedy in this context would precipitate some additional litigation, that is no reason to deny defendants their Sixth Amendment right to counsel during plea negotiations, a most critical stage of the criminal trial process. Judicial administration is an important value, but "[i]t goes without saying that 'the fact that a

given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)); *see also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment) ("[C]urrent limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.").

Moreover, to the extent any frivolous claims are raised, the habeas statutes provide a variety of mechanisms to facilitate their expedient dismissal. *See, e.g.*, 28 U.S.C. § 2255(b) (allowing for dismissal of frivolous claims without a hearing); 28 U.S.C. § 2254, Habeas Rule 4 (same).[5] But "[t]o the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason . . . to keep them from being heard." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 640 n.1 (2007) (Souter, J., dissenting).

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[5] Similarly, § 2254's limitation on second or successive petitions, 28 U.S.C. § 2254(d), and its presumption in favor of state-court fact-finding, *id.* § 2254(e)(1), minimize frivolous collateral challenges by erecting stringent procedural barriers.

CONCLUSION

For the foregoing reasons and those stated in respondents' briefs, this Court should affirm the judgments below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

SUPREME COURT U.S.
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No. 10-209

IN THE
SUPREME COURT OF THE UNITED STATES

BLAINE LAFLER,
Petitioner,

vs.

ANTHONY COOPER.
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Question Presented

I.

What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Indeed, the case currently before the Court arises from a conviction in Wayne County, and another Wayne County case presenting this issue is pending argument before the Michigan Supreme Court (People v McCauley, Michigan Supreme Court No. 140422), that court directing the parties to address "whether a defendant can raise a challenge to the effective assistance of his attorney during the plea bargaining process where the defendant rejected the plea offer and subsequently received a fair trial, and, if so, what remedies should be available to the defendant."

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of the Argument

Defendant has a right under the Sixth Amendment through the Fourteenth Amendment to the "... Assistance of Counsel *for his defence*." The right is provided to afford the defendant a fair trial, one where he or she may meet the prosecution's evidence.

A defendant who has received a fair trial has received that which the constitution guarantees. A part of that fair trial is a right to effective assistance of counsel during that trial and all proceedings designed to ensure *its* fairness. And the *giving up* of the right protected by the constitution—a fair trial—on the advice of counsel requires that the performance of counsel be constitutionally adequate. But there is no right to any level of performance during plea negotiations, as there is no right to a plea, or to negotiations at all.

Further, after a fair trial a defendant cannot show prejudice, having received that which the constitution guarantees. Moreover, it is not possible to put the parties back in the pre-trial posture, for any offer made by the prosecution was premised on avoiding the expense and uncertainty of trial, and that trial has occurred. The prosecution also cannot be forced to "re-offer" any plea concession and hold to it (not withdraw it), as a court has no such power. The only possible "remedy" would be a fair trial, and that has occurred. The matter should thus be at an end in these circumstances.

Argument

I.

The Sixth Amendment right to the effective assistance of counsel is meant to ensure a fair trial. Having received a fair trial, the respondent cannot carry his burden of establishing that counsel was constitutionally ineffective.

A. The Right Protected By the Right to Counsel Is The Right to a Fair Trial

The right to counsel is not a "freestanding" right. One does not simply have a "right to counsel"; rather, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*" The Sixth Amendment was a change from the common law, for the common-law rule had—somewhat oddly—denied the right to those charged with felonies while recognizing it for misdemeanor cases:

> 'Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel.
>
> . . .

> (It) appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . ..' Powell v. Alabama, 287 U.S. 45, 60, 64-65, 53 S.Ct. 55, 61, 77 L.Ed. 158.'
>
> The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions.[1]

And what was the purpose of so extending the right to counsel? What is counsel's function?

- the "provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."[2]

- We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory

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1. *Argersinger v. Hamlin*, 407 U.S. 25, 30, 92 S.Ct. 2006, 2009 (1972).

2. *Powell v. Alabama*, 287 U.S. 45, 70, 53 S.Ct. 55, 64 (1932).

upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.[3]

- ...the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[4]

- ...this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.[5]

- To establish a violation of the Sixth Amendment under *Strickland*, a defendant must show that "counsel's performance was deficient," and that "the deficient performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the

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3. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795 (1963).

4. *United States. v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932 (1967).

5. *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2063 (1984).

defendant of a fair trial, a trial whose result is reliable."[6]

- ...the defendant must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[7]

- We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial,". . .and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such."[8]

- Our decisions have emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial."...Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth

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6. *Strickland*, 466 U.S., at 687, 104 S.Ct., at 2064.

7. *Strickland* at 687, 104 S.Ct. 2052.

8. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697 (1988).

Amendment guarantee is generally not implicated.[9]

- Under our decisions, a criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ... Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[10]

- ...we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, ... [but rather] simply to ensure that criminal defendants receive a fair trial."[11]

The right protected by due process, and by the Sixth Amendment guarantee of counsel in criminal

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9. *Lockhart v. Fretwell*, 506 U.S. 364, 368-369, 113 S.Ct. 838, 842 (1993).

10. *Lockhart*, 506 U.S. at 369.

11. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 1037 (2000).

prosecutions, then, is the right to a fair trial—a proceeding whose result can be said to be reliable.

B. The Right to a Fair Trial Encompasses As Well the Decision to Waive That Right, A Decision to be Made With the Effective Assistance of Counsel, But No More

This brings the matter to *Hill v Lockhart*,[12] and it is that case which is critical, for so many cases rely on it to reach a result contrary to that urged by amicus here. In so doing, they have misread the case, and engaged in a logical fallacy. If, as the this Court has said,"the purpose of the effective assistance guarantee of the Sixth Amendment is . . . simply to ensure that criminal defendants receive a fair trial," then an accused who *gives up* that constitutionally-protected right (and thus has not had a trial at all) on advice of counsel must receive advice "within an objective standard of reasonableness," that advice being reviewed with great deference. And so this Court found in *Lockhart* that where counsel's performance is so deficient as to justify a finding that there is a reasonable probability that but for that deficient performance the accused would not have *given up* his or her right to a fair trial by pleading guilty, that *plea* may be set aside, so that the constitutionally-protected fair trial may be *had*. This makes perfect sense, and is fully consistent with *Powell*, *Strickland*, and their progeny.

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12. See *Hill v Lockhart*, 474 US 52, 59, 106 SCt 366, 370, 88 LEd2d 203 (1985).

But the doctrine on which the Court of Appeals based its findings—and its direction as to "remedy"—is premised on a widespread misapplication of *Lockhart*.[13]

(1) The logical error in applying Lockhart to convictions had after a fair trial

Lockhart is viewed in many cases as simply stating a rule the logical equivalent of which is the rule stated by the Court of Appeals in this case. Indeed, many cases "quote" from *Lockhart*, but move the "not," again, as though the propositions are logically equivalent. The statement of the rule of *Lockhart* is that defendant must prove both that his counsel's performance was deficient and that *"there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would*

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13. Among the many cases citing *Lockhart* for the proposition that there is a right to relief after a fair trial if counsel performed "ineffectively" during plea negotiations are the the Court of Appeals holding in the present case; *Williams v Jones*, 571 F3d 1086 (CA 10, 2009), rehearing en banc denied 583 F3d 1254 (CA 10, 2009); *Julian v Bartley*, 495 F3d 487 (CA 7, 2007); *United States v Herrera*, 412 F3d 577 (CA 5, 2005); *Commonwealth v Mahar*, 809 NE2d 989 (Mass, 2004); *Nunes v Mueller*, 350 F3d 1045 (CA 9, 2003); *Magana v Hofbauer*, 263 F3d 542 (CA 6, 2001); *State v McDonald*, 10 P3d 1193 (Az App, 2001); *Coulter v Herring*, 60 F3d 1499 (CA 11, 1995); *United States v Day*, 969 F2d 39 (CA 3, 1992).

have insisted on going to trial." Cases dealing with the present situation, where defendant went to trial rather than pleading guilty, actually employ a rearranged version of this test, saying that defendant prevails if he or she proves both that counsel's performance was deficient and that "there is a reasonable probability that, but for counsel's errors, he would . . . [the "not" being removed from the *Lockhart* rule with the substitution of elipsis dots] have pleaded guilty and would [not] [the "not" from *Lockhart* being relocated here, accompanied by brackets] have insisted on going to trial."[14] This reworded rule is stated as though it necessarily follows from *Lockhart*, being but its "converse,"[15] so that no more justification for setting aside the conviction had at a fair trial is required. But this is a logical error. The latter proposition is not the converse of the first. The converse of the proposition "All defendants who pled guilty because of counsel's

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14. See e.g. *Smith v. Singletary*, 170 F.3d 1051, 1053 (CA 11, 1999) ("To prevail on an ineffective-assistance-of-counsel claim, a habeas corpus petitioner must show that: (1) his lawyer's performance was deficient, and (2) 'a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.' "

15. See e.g. *Williams v. Jones*, 583 F.3d at 1255("This case merely presents the converse of *Hill*....); *Cleveland v. State*, 674 S.E.2d 289, 291 (Ga.,2009); *State v. Donald*. 10 P.3d 1193, 1199 (Ariz.App. Div. 1,2000); *In re Alvernaz*, 830 P.2d 747, 753 (Cal.,1992).

errors are entitled to a fair trial" is "All defendants who have a fair trial are entitled to plead because of counsel's errors."[16] And the converse of an affirmative categorical proposition is not generally true in any event.[17] That one who *waives* the constitutionally-guaranteed right to a fair trial

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16. Using syllogistic terms, *Lockhart* proceeds as follows:

> All [defendants who pled guilty because of counsel's errors](subject) are entitled to be [defendants who receive a fair trial](predicate).
> Defendant [pled guilty because of his counsel's errors].
> Defendant is [entitled to a fair trial]

Cases such as *Williams v Jones* reason:

> All [defendants who pled guilty because of counsel's errors](subject) are entitled to be [defendants who receive a fair trial](predicate)[the holding of *Lockhart*]
> Defendant [had a trial because of his counsel's errors].
> Defendant is [entitled to a plea]

This is a non sequitur. Further, the converse of All S is P is All P is S (conversion is the exchange of the subject and predicate terms), and in the case of a categorical-affirmative proposition (an "A" proposition) is generally untrue. For example, the converse of "All dogs are animals" is "All animals are dogs." See Irving Copi, *Introduction to Logic* (3rd Ed., 1968), p. 135.

17. Irving Copi, *Introduction to Logic* (3rd Ed., 1968), p. 135.

because of poor advice amounting to ineffective assistance is entitled to have that plea set aside and have a trial simply says nothing at all about whether one who *has* a fair trial is entitled to set aside the result of that trial because his attorney performed "deficiently" during the non-constitutionally guaranteed plea negotiations. Some justification beyond a mere citation to *Lockhart* is required.

(2) There is no right to a negotiated plea, and thus no right to a performance standard with regard to plea negotiations

That one is entitled to the advice of competent counsel when *waiving* the right to a fair trial (and those rights attendant to it) does not mean that one has the right to the advice of competent counsel in *not* waiving—that is, asserting—the right to fair trial, other than that the performance *at* that trial must be effective as understood in *Strickland*. Again, cases misread or "overread" *Hill v Lockhart*. Cases often cite that decision for the proposition that "Defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Hill v. Lockhart,* 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985),"[18] or it is said that *Hill v*

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18. See e.g. *Humphress v. United States,* 398 F.3d 855, 858 (CA6, 2005)"Defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Hill v. Lockhart,* 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203

Lockhart holds the *Strickland* test "applicable in the context of plea bargains."[19] But that is not what the this Court said; it has not said vaguely that the effective assistance right applies in the "context of guilty pleas" disconnected from the entry of a guilty plea, which waives the right to a fair trial. The defendant in *Hill v Lockhart waived* his right to a trial by pleading guilty, and argued that he had been ineffectively advised by counsel. This Court said not that the defendant had a right to effective assistance during plea negotiations, but that "Where, as here, a defendant is represented by counsel during the *plea process and enters his plea upon the advice of counsel,* the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'... a defendant who *pleads guilty upon the advice of counsel* may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*"[20]

(1985)."

19.See Note, "Opportunity Lost?—the Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains," 42 Suffolk U. L. Rev. 709, 727 (2009).

20. *Hill v. Lockhart,* 474 U.S. at 56, 106 S.Ct. at 369 (emphasis supplied). And the Court concluded "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. at 58, 106 S.Ct. at 370.

That a defendant who "pleads guilty on the advice of counsel"—who gives up that constitutionally-guaranteed right and its attendance constitutional rights—is entitled to advice that is "within the range of competence demanded of attorneys in criminal cases" is unremarkable. But this says nothing about whether a defendant is entitled to any performance standard of counsel in the *assertion* of the right to trial, and, given that a negotiated plea is *not* a constitutional right, the situations are hardly analogous. Indeed, one who is entitled to a particular procedure under the constitution is *not* entitled to its opposite; there are no cases finding a requirement of advice "within the range of competence demanded of attorneys in criminal cases" in the assertion of the right to jury trial, for example.[21] And the law is clear that a defendant has " no "right" to negotiate a plea. This

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21. The only exception is when the "opposite" of the right is also a constitutional right. In Illinois the defendant has a constitutional right to both a bench trial and to a jury trial, so that the assertion of the one is a waiver of the other, and for that reason in Illinois it is possible to have ineffective assistance in the decision to have a jury trial. See *People v. McCarter*, 897 N.E.2d 265, 286(Ill.App. 1 Dist., 2008) ("Under the Illinois constitution, an accused has the right to waive trial by jury. . . .when defendant claims that counsel's error caused him to waive his right to a jury trial, prejudice under *Strickland* occurs when "'there exists a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error'").

Court itself has said not only that "there is no constitutional right to plea bargain," but also that "*It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.*"[22]

Because the constitutional right which is protected is the right to a fair trial, "critical stages of the proceedings" for application of the Sixth Amendment, and the performance standard under *Strickland*, are those where "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial"; on the other hand, no "standard of performance" applies (as counsel is not required) where "there is minimal risk that [defendant's] counsel's absence . . . might derogate from [the] right to a fair trial."[23] *Strickland* recognized that counsel is crucial to our adversarial system precisely because "access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution' to which they are entitled."[24] And again, included is the *waiver* of the right to a fair trial through the entry of a guilty plea; as *Hill v*

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22. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L Ed 2d 30 (1977) (emphasis supplied).

23. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 1933, 18 L Ed 2d 1149 (1967).

24. *Strickland*, 466 US 6 at 685, 104 SCt at 2063 quoting *Adams v United States ex rel McCann*, 317 US 269, 275-276, 63 SCt 236, 240, 87 Led 268 (1942);

Lockhart held, the "two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."[25]

Where counsel's performance both before and during trial was adequate under *Strickland* to provide that ample opportunity to meet the prosecution's case, the inquiry should be at an end, the defendant having received that assistance the Constitution affords to ensure the trial was a fair adversarial search for the truth involved in the matter. In other words, a defendant who has received a fair trial has received all that to which he has a constitutional "right."

C. A Defendant Who Received a Fair Trial Cannot Show Prejudice As Described in *Strickland*

This Court in *Strickland* focused upon counsel's performance only to determine that an accused's right to trial was adequately protected, not to assess whether counsel acted to maximize any potential benefit to him. Judge Easterbrook in *United States v Springs*[26] powerfully described the narrow range of the inquiry.

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25. And thus it is that a defendant uninformed or misinformed about the deportation consequences of his plea may void that plea on grounds of ineffective assistance of counsel. *Padilla v. Kentucky*, __US__, 130 S.Ct. 1473, 1485 (2010).

26. *United States v Springs*, 988 F2d 746, 749 (CA 7, 1993).

- Not every adverse consequence of counsel's choices is "prejudice" for constitutional purposes. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v Fretwell*, 506 US 364, ----, 113 SCt 838, 842, 122 LEd2d 180 (1993)....*The guarantee of counsel in the sixth amendment is designed to promote fair trials leading to accurate determinations of guilt or innocence. The Constitution does not ensure that lawyers will be good negotiators, locking in the best plea bargains available*....

- The "prejudice" component of ineffective assistance "focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair.... *Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.*" *Fretwell*, 506 US at ----, 113 SCt at 844. Prosecutors need not offer discounts and may withdraw their offers on whim.

Precisely so. As Judge Easterbrook has pointed out, this Court itself that has said that "Unreliability or unfairness does not result if the ineffectiveness of

counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Counsel here did not "deprive the defendant of any substantive or procedural right to which the law entitles him."[27]

Representative of those cases finding prejudice upon a showing by the defendant that "there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded guilty and would [not] have insisted on going to trial" are *Williams v Jones*,[28] *Magana v Hofbauer*,[29] and the present case.[30] As is typical, the panel in *Williams v Jones* relied on *Lockhart* as supposedly establishing that an ineffective assistance claim will lie even after a fair trial. As to prejudice, the panel in conclusory fashion stated that "The fact that Mr. Williams subsequently received a fair trial (with a much greater sentence) simply does not vitiate the

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27. And any argument that one is denied the right to effective assistance by receiving ineffective assistance is circular and invalid; *Fretwell* is discussing the prejudice component, and says that *prejudice* does not exist unless counsel's performance denies the defendant some substantive or procedural right.

28. *Williams v Jones*, 571 F3d 1086 (CA 10, 2009), rehearing en banc denied 583 F3d 1254 (2009).

29. *Magana v Hofbauer*, 263 F3d 542 (CA 6, 2001).

30. *Cooper v Lafler*, 2010 WL 1851348 (CA 6, 2010(unpublished).

prejudice from the constitutional violation."[31] Though recognizing that this Court has said that the right to effective assistance serves the purpose of protecting the right to a fair trial, the panel pointed also to language that counsel "can be ineffective where 'his mistakes have harmed the defense.' ...Surely the plea process is part of the defense."[32] When rehearing en banc was denied, several judges replied to the dissent, taking the view, the fallacy of which was discussed previously, that "This case merely presents the converse of *Hill*...."[33]

In *Magana* defendant's counsel mistakenly advised him the most he would receive after a trial conviction was two concurrent sentences, when the sentences were in fact by statute consecutive. Defendant testified that if he had known that, he would have taken the government's plea offer, and so his trial conviction should be set aside. Relying on *Hill v Lockhart*, the panel agreed. As a "remedy," the panel ordered that the district court issue a conditional writ mandating that the state either offer the defendant the original plea offer, or, if the state could rebut an unexplained "presumption of vindictiveness," it could offer a less favorable plea. Retrial was apparently not permitted by the order

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31. *Jones*, at 1091.

32. *Jones*, at 1092. Judge Gorsuch dissented; that dissent, and his dissent from the denial of rehearing en banc, will be discussed later.

33. *Williams v Jones (Denying Rehearing En Banc)*, 583 F3d at 1255.

("If the state can meet its burden [of rebutting the presumption of vindictiveness"], then the parties are free to negotiate a new plea. If the state cannot overcome the presumption and it refuses to reinstate its original offer, then the writ must be granted").[34] The panel in the present case also relied on *Hill v Lockhart*, and gave the back of its hand to the Warden's argument that there was no prejudice because the defendant received a fair trial, a view it characterized as "myopic."[35] As a remedy, the district court had ordered the state to either reinstate the original plea offer or release the defendant, relief which the court of appeals upheld: "Allowing petitioner an opportunity to assess and accept the plea deal, with the competent assistance of counsel, remedies this wrong....A new trial does not."[36] After all, said the panel—myopically—"[T]he district court did nothing more than hold the state to a deal the state had previously offered"[37]—an offer that, as Judge Easterbrook noted in *Springs*, the state could withdraw "on a whim" even after its acceptance by the defendant but before either the plea was taken or some detrimental reliance by performance (such as testifying against a codefendant) had occurred, and which was premised, at least in part, on *saving* the state and the witnesses from the time and expense of a trial, a

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34. *Magana*, at 553.

35. *Cooper*, at 10.

36. *Cooper*, at10.

37. *Cooper*, at 10.

trial which has now occurred, and was successfully prosecuted by the state. From where comes the authority of the court to "hold" the State to the plea offer, particularly on this state of facts?

The opposite view is perhaps best expressed by Judge Gorsuch's dissent in *Williams v Jones* to both the panel decision and the decision denying rehearing en banc, and in the opinion of the Utah Supreme Court in *State v Greuber*.[38] In addition to observing that "no decision from the United States Supreme Court has ever held (or even hinted) that a lawyer's bad advice to reject a plea officer gives rise to a violation of the Sixth Amendment, or any other provision of federal law,"[39] Judge Gorsuch dissenting from the denial of rehearing en banc in *Williams v Jones*, Judge Gorsuch argued that under *Strickland* the defendant must show that his lawyer's bad advice or deficient performance "prejudice[d] the defendant by infringing some legal *entitlement* due him."[40] In his dissent to the panel decision, Judge Gorsuch made the further point that this Court itself has said that the "right 'to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the

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38. *State v Greuber*, 165 P3d 1185, 1189 (Utah, 2007).

39. *Jones*, 583 F3d at1258 (Gorsuch, J. dissenting).

40. 583 F3d at 1259 (emphasis in the original).

accused to receive a fair trial.'"[41] "Constitutional scrutiny," then, "is applied only to the procedure that deprives the defendant of his liberty, and ...executory plea bargains do not."[42] Moreover, added Judge Gorsuch, it is not possible to restore the parties to the position they had been in by way of remedy, for even if the defendant had accepted a plea offer, "the prosecutor would have been free to withdraw it on a whim. . . . So ordering specific performance of plea agreement would not restore [defendant] to his original position; it would confer on him something he never had to begin with: a *legal entitlement*, as opposed to a *chance*...." to achieve a lesser conviction and sentence, transforming the plea bargaining process from "an act of executive discretion to one of judicially enforceable right."[43] Precisely so.

In much the same vein is the Utah decision of *State v Grueber*, the Utah Supreme Court finding that once the offer has not been taken, and the defendant has received "his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity," for the "balance of risks and incentives on both sides that existed prior to

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41. *Williams v Jones*, 571 F3d at 1099, quoting *United States v Cronic*, 466 US 648, 104 S Ct 2039, 80 L Ed 2d 657 (1984).

42. 571 F3d at 1101.

43. 571 F3d at 1110.

trial"[44] cannot be recreated, and the attempt to do so engaged in here itself violates constitutional principles of separation of powers.[45]

The Court of Appeals has ordered relief that places respondent in his pretrial position, but with a benefit. Where before trial the prosecutor could have withdrawn the plea offer, as Judge Easterbrook has noted, at whim, now the prosecutor is *compelled* by the judiciary to make that executive act, or rebut some showing of vindictiveness[46] to allow an offer in excess of that originally made (which again, before trial the prosecutor could have withdrawn at whim), and if that showing is made and the new offer rejected, rather than the conviction being reinstated, as a fair trial was had, it appears a new trial is mandated! This all violates principles of separation of powers. Returning to the pretrial posture—erasing history—is not possible, for that "position" included a position *occupied by the State*—a pretrial posture, where the State was willing to exchange the expense and uncertainty of a

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44. *Id* at 1190.

45. Similarly, see *Bryan v State*, 134 SW3d 795 (Mo.Ct.App. 2004); *Commonwealth v Mahar*, 809 NE2d 989 (2004)(concurring opinion), and *State v Monroe*, 757 So.2d 895 (La.Ct.App.2000).

46. It is not explained why such a presumption arises; in any event, the fact that the State successfully prosecuted the case at trial to conviction would be ground enough to rebut any "presumption."

trial for a certain conviction, albeit on lesser charges. That ship has sailed, and cannot be recalled. As the Utah Supreme Court pointedly observed in *State v Greuber*,[47] once the offer has not been taken, and the defendant has received "his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity," for the "balance of risks and incentives on both sides that existed prior to trial"[48] cannot be recreated. Moreover,

> some courts have required the prosecution to give the defendant the same offer he had before trial, even though the defendant has since been convicted at a fair trial. . . .Under the doctrine of separation of powers, we do not believe courts have the power, in the absence of prosecutorial misconduct, to require the prosecution to dismiss charges, as would often be necessary to enact the earlier rejected plea.. . . Further, requiring the state to reoffer after trial a plea bargain it may have made originally to avoid the expense and risk of a trial violates separation of powers and basic fairness principles. . . .
>
> In recognition of these difficulties, other courts have instead granted the defendant a new trial. . . .[but] a new

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47. *State v Greuber*, 165 P3d 1185, 1189 (Utah, 2007).

48. *Id* at 1190

> trial cannot restore the defendant's "opportunity to plead guilty to lesser charges with lesser sentences." . . .In addition, ordering a new trial may sometimes constitute a thinly veiled attempt to force the prosecution to reinstate the initial offer. . . .*Further, there is no guarantee that the delicate balance of witness availability and evidence will be the same after the first trial as it was at the time of the initial plea offer*. . . . if witnesses and evidence are not available, it is possible that a new trial will result in an acquittal, "a 'remedy' out of all proportion to the damage allegedly done by the ineffective assistance in connection with the earlier plea offer." . . .
>
> The unavailability of a rational remedy for ineffective assistance of counsel in the rejection of plea offers illustrates the flaws inherent in treating identically defendants who have received fair trials and those who have forgone trials and pled guilty.[49]

D. Conclusion

This Court should find that no "effective assistance" inquiry regarding plea negotiations is pertinent after a conviction resulting from a fair

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49. *State v. Greuber*, 165 P.3d at 1190 -1191 (emphasis supplied).

trial. An accused has no right to a negotiated plea; in fact a substantial number of defendants never receive offers from the prosecutor. Executive branch prosecuting authorities are not required to make any concessions in order to obtain a guilty plea, and even if they do so, and the defendant accepts the terms, that offer may be withdrawn until such time as the plea has been accepted by the court, or detrimental reliance of a concrete sort—such as the giving of testimony against an accomplice—has occurred.[50] The decision to charge and the choice of charges are executive decisions, with which the judiciary may not interfere nor superintend. Review of these decisions is not, for example, for abuse of discretion, but only for abuse of power; that is, as to whether the prosecuting authority has exercised its power unconstitutionally by engaging in selective prosecution based on invidious discrimination.[51] And in cases of federal habeas corpus principles of comity are also presented. Foregoing the constitutionally-guaranteed fair trial by admitting guilt and *having* the constitutionally-guaranteed fair trial are far different things, as the Utah Supreme Court

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50. See *Mabry v Johnson*, 467 US 504, 104 SCt 2543, 81 LEd2d 437 (1984).

51. See eg *United States v Palmer*, 3 F3d 300, 305 (CA 9, 1993)("separation of powers concerns prohibit us from reviewing a prosecutor's charging decisions absent a prima facie showing that it rested on an impermissible basis, such as gender, race or denial of a constitutional right." Also *People ex rel Leonard v Papp*, 386 Mich 672, 684 (1972).

understood in *Greuber* and Judge Easterbrook in *Springs*.[52]

The respondent received a fair trial, whatever the performance of his counsel during plea negotiations, and that performance was not deficient And to vacate his convictions and sentence and require that the State offer a plea it no longer wishes to violates separation of powers principles as well as principles of comity. The Court of Appeals should be reversed.

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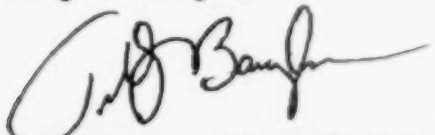
52. The 10th Circuit has reached the same erroneous conclusion as the Sixth Circuit in *Williams v Jones*, 571 F3d 1086 (CA 10, 2009), over a dissent, rehearing en banc denied *Williams v Jones*, 583 F3d 1254 (CA 10, 2009), over the dissent of four judges. And see, rejecting claims of ineffective assistance in this context, *Bryan v State*, 134 SW2d 795 (Mo.Ct. App, 2004); *State v Monroe*, 757 So.2d 895 (La.Ct.App 2000).

Relief

The People request this Honorable Court reverse the Court of Appeals.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



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